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AKONE'S WADI, }
GIRDARNA }

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THE VYAVAHĀRAMAYŪKHA OF NĪLAKAṆṬHA

TRANSLATED INTO ENGLISH

with explanatory Notes and references
to decided cases

BY

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PREFACE

The Vyavahāramayūkha of Nilakanṭha is a work of paramount authority on Hindu Law in Gujerat, the town and island of Bombay and in northern Konkan. Even where, as in the Maratha country and in the District of Ratnagiri, the Mitākṣarā is the paramount authority, it occupies a very important, though a subordinate place. The first English translation of the Vyavahāramayūkha was published in 1827 by Borradaile. Considering the state of Sanskrit scholarship among Westerners more than a hundred years ago the translation was a creditable performance. But, as has been judicially noticed, Borradaile's translation is in many places infelicitous¹, obscure² or positively wrong³. Besides, Borradaile's method of dividing the translation into chapters, sections and placita, though convenient to judges and lawyers for purposes of reference, conveyed to those unacquainted with the Sanskrit language or the original work the wrong impression that the original was similarly divided. About fifty years ago the late Rao Saheb V. N. Mandlik brought out a scholarly translation of the Vyavahāramayūkha, that was a great improvement on Borradaile's work, both in the accuracy of the translation and the method of its presentation. That work is not now available in the market. It omitted the section on ordeals, it did not refer to decided cases and was also inaccurate in some places, as a reference to the pages indicated in the Index to this translation will show. In 1924 Mr. J. R. Gharpure of Bombay, the indefatigable editor of the 'Collection of Hindu Law Texts' brought out a translation of the Vyavahāramayūkha. In this translation he generally follows the late Rao Saheb V. N. Mandlik, though here and there improvements are made; but he does not translate the section of the work on ordeals, nor does he cite even a considerable body of decisions of the High Courts that have a direct bearing on the text of the Vyavahāramayūkha.

In the translation here presented, the whole of the Vyavahāramayūkha has been rendered into English. The text chosen for translation is that contained in the edition of the Vyavahāramayūkha published by the Bhandarkar Oriental Research Institute at Poona in 1926. The pages of the text have been indicated at the bottom of the pages of the translation. In this translation, explanatory notes have been added in order to elucidate the meaning of the author. References to the pages of the notes in the Poona edition where the Vyavahāramayūkha has been exhaustively annotated have also been given in appropriate places for those who want to make a deeper study of the original and the translation. The Vyavahāramayūkha is written in continuous prose, except where quotations in verse (which are numerous) are cited from

1. Vide 2 Bom. 888 at p. 421.

2. Vide 14 Bom. 612 at p. 617, 17 Bom. 759 at p. 762.

3. Vide *Sitaba v. Vasantrao* 3 Bom. L. R. 201 at pp. 205-6.

ancient works and sages. In the present translation quotations in verse have been clearly indicated by the method of beginning them in a separate line and by lessening the size of the lines of the translation of verses by a few letter spaces as compared with the rest of the work. Another feature of this translation is that exhaustive citations of decided cases have been made wherein the Mayūkhā has either been quoted explained criticized referred to or which have an important bearing on the law as laid down in the Vyavahāramayūkhā. The decisions of courts have in a few places been also criticized. It has however to be borne in mind that this work does not *profess* to be a *treatise on Hindu Law* and that therefore no one should expect that all possible cases on Hindu Law would be found digested herein.

As judges and the legal profession have been accustomed for decades to use the translations by Borradaile and Mandlik and as decided cases cite quotations from and give references to these translations in the corner of each page of this translation corresponding portions of Borradaile's translation contained in Stokes collection of Hindu Law books and Mandlik's translation have been indicated with the letters S and M respectively.

The Introduction to the edition of the text of the Vyavahāramayūkhā deals exhaustively with the family and personal history of Nilakanṭha the works of Nilakanṭha the period of his literary activity the contents of his twelve Mayūkhās which together constitute his digest called Bhagavata bhāṣkāra his position in Dharmasāstra literature and the position of the Vyavahāramayūkhā in modern Hindu Law. Those who want to make a detailed study of these matters must refer to that Introduction. But for the benefit of those who do not know Sanskrit a brief treatment of the matters detailed above is given here.

An exhaustive synopsis of contents an index of cases and Law Reports and a general index which also contains in italics important Sanskrit words will it is hoped add to the usefulness of this edition of the translation of the Vyavahāramayūkhā.

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INTRODUCTION

Information about the family of Nilakanṭha can be gleaned from several sources. Śaṅkarabhāṭṭa, the father of Nilakanṭha, wrote an account of the family called Gādhivams'ānucarita. This work was so called because the *gotra* of the family was Viś'vāmītra. The work was brought to the notice of scholars by the late Mahāmahopādhyāya Haraprasād Śāstri (vide Indian Antiquary, vol 41 pp 7-13) Pandit Kāntanāthabhāṭṭa published at Mirzapur in 1903 a poem called ' Bhāṭṭavams'akāvyaṃ ' in ten *sargas* (cantos) and 409 verses, in which he gives a detailed history of the family to which both he and Nilakanṭha belonged. Besides, the numerous works composed by the members of this family during the period of several centuries furnish considerable material for constructing a brief but reliable history of the family.

The home of the family was at Patthan in the Deccan on the Godāvāri. The *gotra* of the family was Viś'vāmītra or Gādhi. The most ancient ancestor named is Nāgapāś'a or Nāganātha, whose son was Cāṅgadeva, whose son was Govinda. The real history of the family begins with Rāmes'varabhāṭṭa, son of Govinda. Rāmes'varabhāṭṭa was a very learned man, had numerous pupils, cured of leprosy the son of an influential Mahomedan officer of the Ahmednagar kingdom and travelled extensively. When on a pilgrimage to Dvārakā his first son Nārāyanabhāṭṭa was born to him in *s'aka* 1435 (1513 A.D.). Rāmes'varabhāṭṭa migrated eight years later to Benares. He had two more sons Ś'ridhara and Mādhava. Rāmes'vara died at a very advanced age and his wife became a *satī*.

Nārāyanabhāṭṭa learnt all the śāstras at the feet of his father. He vanquished Maithila and Gauda pandits at the house of Todarmal, the famous financier, scholar and statesman in the reign of Akbar. He was the most illustrious member of his family. He was very fond of copying and collecting Sanskrit manuscripts. He is said to have rebuilt the famous temple of Viś'veś'vara at Benares that had been razed to the ground by the Mussalmans. For his great learning and piety Nārāyanabhāṭṭa was given the title of ' Jagadguru ' and his family was given the first place of honour in the assembly of learned brāhmanas and at the recitation of the Vedas, which latter distinction, it is said, still continues in the family. Nārāyanabhāṭṭa wrote the Prayogarātna, Tristhalisetu and several other works.

Nārāyanabhāṭṭa had three sons, Rāmakṛṣṇa, Śaṅkara and Govinda. Rāmakṛṣṇa was a very learned man and a great student of Mīmāṃsā. Śaṅkarabhāṭṭa was a profound mīmāṃsaka. He wrote a commentary on the Śāstra-dīpikā, a work called Dvaitanirṇaya, the Mīmāṃsābālaprakāś'a, the Dharma-prakāś'a and several other works.

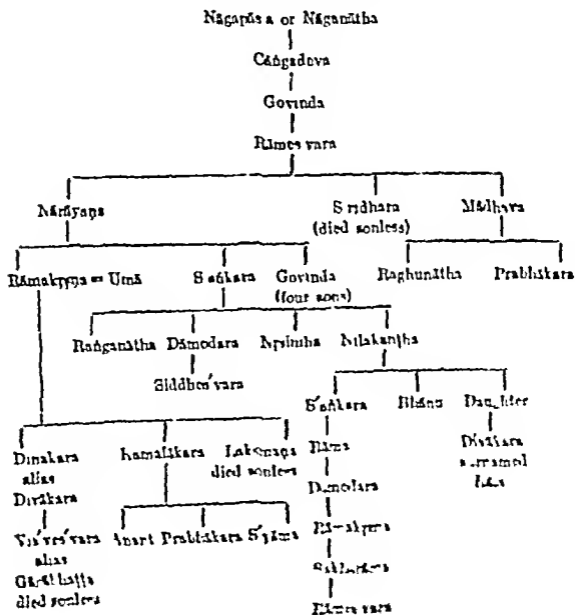
Rāmakṛṣṇa had three sons, Dinakara alias Divākara, Kamalākara and Lakṣmaṇa. Dinakara wrote the Bhāṭṭādinakari, the Śāntisāra, the Dinakaio-

ddyota. Kamalakara wrote no less than twenty-two works. The Nirayasindhu, one of his earliest works was composed in 1612 A D. Lakṣmana wrote the Ācararatna the Gotrapravararatna and other works.

As the colophon to the Vyavahāratattva of Nilakanṭha shows, Śaṅkara bhāṭṭa had four sons Raṅganātha Dāmodara, Nṛsiṃha and Nilakanṭha, the last being the youngest.

Dinakara alias Divākara had a son called Visveśvarabhāṭṭa or Gāḍā bhāṭṭa. The latter officiated at the coronation of Shivaji the founder of the Maratha Empire. He completed his father's digest called Uddyota and wrote the Bhāṭṭacinṭāmaṇi the Kāyasthadharmadīpa the Śīvārkoḍaya and several other works.

The pedigree of the family as far as Nilakanṭha his cousins and his immediate descendants are concerned is set forth in the accompanying table.



Dāmodarabhaṭṭa, the older brother of Nilakanṭha, had a son Siddheśvara who composed a work called Saṁskāramayūkha in 1679-80 A. D. Nilakantha had two sons, Śāṅkara and Bhānu. Śāṅkara had a hand in editing his father's Saṁskāramayūkha. He is also the author of Kuṇḍabhāskara, Vratārka and other works. Bhānubhaṭṭa also wrote several works. Nilakantha's daughter's son Divākaraabhaṭṭa Kāla (Kale in Marathi) was a very learned man and composed an extensive digest called Dharmasāstrasudhānidhi. It is not necessary to pursue here the history of the family beyond this stage.

Nilakantha composed an encyclopædia dealing with the various topics of dharmasāstra. This work is generally styled Bhagavanta-bhāskara in honour of Nilakantha's patron, Bhagavanta-deva or Bhagavantavarman, a Bundella chieftain of the Sengara (Śrīgīvara) clan, who ruled at Bhareha near the confluence of the Jumna and Chambal. As the whole work was styled Bhāskara (the sun), the twelve parts of it bear the name Mayūkha (ray). In most of the Mayūkhās Nilakantha expressly states that he composed the work at the command of Bhagavantadeva.

The order in which the twelve Mayūkhās were composed and the subjects of which they treat are as follows: (1) Saṁskāramayūkha (the description of the principal saṁskāras i.e. purificatory ceremonies such as garbhūdbhāna, jñtakarma, nāmakaiana, upanayana, marriage etc. and matters ancillary thereto); (2) Ācāramayūkha (the daily duties from rising to going to bed such as brushing the teeth, bathing, worship, sandhyāvandana, japa, homa, the five daily yajñas, taṭpana, meals etc.); (3) Samaya-mayūkha (the *tithis* and their nomenclature, important festivals like Rāmanavamī, Navarātra, Mahāśivarātra etc., offering of pinda on amāvāsyā, eclipses, rites appropriate to each month from caitra, the intercalary month, actions prohibited in the Kali age); (4) Śrāddha-mayūkha (definition of śrāddha, pārvana and ekoddiṣṭa, proper time and place for śrāddha, persons competent to offer śrāddha, food allowed in śrāddha, brāhmanas unfit to be invited at śrāddha etc.); (5) Nītimayūkha (king, coronation, king's duties, seven constituent elements of a state, envoys, etc.); (6) Vyavahāramayūkha (procedure and eighteen titles of law); (7) Dāna-mayūkha (definition of *dāna*, kinds of gifts, sixteen great gifts, etc.); (8) Utsarga-mayūkha (dedication of a reservoir of water, wells etc. to the public, the ritual thereof, planting of trees etc.); (9) Pratisthāmayūkha (consecration of temples and images, repairing old temples etc.); (10) Prāyaścittamayūkha (definition of prāyaścitta, hells, different births to which sinners are condemned, various kinds of prāyaścittas, visit to sacred places), (11) Śuddhimayūkha (purification of vessels of gold, silver, copper, clay etc., periods of impurity on birth and death; practice of *śatī* etc.); (12) Śāntimayūkha (definition of śānti, Vināyakaśānti, graha-śānti, various propitiatory rites on the happening of portents or inauspicious things).

Nilakantha also composed a work called Vyavahāratattva, which is an abridgment of the Vyavahāramayūkha. This work has been published as an

appendix to the edition of the Vyavaharamayūkha (Bhandarkar Oriental Institute Poona). In that work he refers to the Vyavaharamayūkha as already composed by him. So that work is not a first rough draft or plan of the Vyavaharamayūkha but is rather an epitome of his larger work for the benefit of beginners. He appears to have composed a separate work on adoption viz. Dattakanirṇaya.

Nilakanṭha's literary activity must be placed in the first half of the 17th century. We saw above that his grand father Nārāyaṇabhaṭṭa was born in 1513. His father Śaṅkara bhaṭṭa quotes in his Dvaitanirṇaya the Tōḍarānanda which must have been composed between 1570 - 1586 (the year of the death of Tōḍarānanda). So the Dvaitanirṇaya was not composed much earlier than 1600 A. D. Kamalīkara who was the paternal first cousin of Nilakanṭha composed in 1612 A. D. his Nirnayasindha which was one of his earliest works. Onms. of the Vyavaharatattva bears the date samvat 1700 (i.e. 1643-44 A. D.). Śaṅkara the son of Nilakanṭha composed his Kumbhābhāskara in 1671 and Divākara bhaṭṭa daughter a son of Nilakanṭha wrote his Ācāraka in 1686 A. D. Therefore Nilakanṭha's literary activity lies between 1610 and 1650 A. D.

Nilakanṭha occupies a prominent position among the mediæval Sanskrit writers on dharmaśāstra. He frequently differs from Viṣṇuśara the renowned author of the Mitākṣarā. These differences have been pointed out in the notes and in the Index. In the arrangement of the subjects of dharmaśāstra and in their treatment he was largely influenced by the Madanaśrauta. He frequently refers to other digests and encyclopedias like his own viz. the Catyayagacintāmaṇi of Hemādri the Virāṭratnakara of Captesvara, the Nṛsiṅhaparāśada and the Tōḍarānanda. Nilakanṭha expresses frank dissent even from the most eminent of his predecessors. He boldly criticises even his father's views though Śaṅkarabhaṭṭa was a profound Mīmāṃsaka. Nilakanṭha was himself a profound student of the Mīmāṃsā system. In the vastness of the materials drawn upon in ease and grace of style in the brevity and lucidity of his remarks in clearness of vision and in logical presentation of topics he is hardly surpassed by any mediæval writer on dharmaśāstra.

A few words about the position of the Vyavaharamayūkha in modern Hindu Law may not be out of place here. It has been repeatedly cited by the Privy Council and by the Bombay High Court that Manu, Smṛiti, Mitākṣarā and the Mayūkha are the books of chief authority in Western India. In the Maratha country and in the Patna and Delhi it is the book of paramount authority and a secondary place is given to the Mayūkha.

1. For instance see the following (1) in the (P. C.) 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

is assigned to the Vyavahāramayūkha.¹ The Vyavahāramayūkha is of paramount authority in Gujerat, the town and island of Bombay and in northern Konkan.² Though the pre-eminence of the Mitāksarā in the Maratha country is acknowledged, yet in a few instances its doctrines have been either set aside or modified in favour of the views propounded by the Vyavahāramayūkha. For instance, though the Mitāksarā nowhere expressly recognizes the sister as a *gotraja sapinda*, the courts, following the Mayūkha, have assigned to her a very high place as an heir even in the Maratha country and in Ratnagiri. It is a well-established rule of the Bombay High Court that where the Mitāksarā is either silent or obscure the aid of the Vyavahāramayūkha must be invoked for its interpretation and the principle of interpretation is to harmonize both works wherever and so far as that is reasonably possible.³ It is instructive to see how the Vyavahāramayūkha came to be recognised as the leading authority in Gujerat in matters of Hindu Law. It has been stated above that the family of Nilakantha came from Parthan in the Deccan. Naturally all the learned members of this family, though they wrote in Benares or elsewhere, preferred the usages of the Deccan and Śāṅkarabhaṭṭa, the father of Nilakantha, says in his *Dvaita-nirnaya* that he will abide by the views of Deccan writers. Therefore the works of the Bhaṭṭas of Benares were highly esteemed by the learned men of the Maratha Country. That the Mayūkhās of Nilakantha were eagerly sought for even as far to the south as Belgaum in the times of the Peshwas is established by a letter of Naro Vinayak, Mamlatdar of Athni in the present Belgaum District, dated 28th June 1797⁴, where reference is made to the copying of the six Mayūkhās on *samskāra*, *ācāra*, *saṁaya*, *śrāddha*, *nīti* and *vyavahāra* and a request is made that the other six Mayūkhās might be sent for a copy being made. When the Marathas held sway over Gujerat in the 18th century, the works of Kamalākara (particularly the *Nirnaya-sindhu*) and of Nilakantha were relied upon by the śāstris at the court of the Maratha rulers of Gujerat.⁵ Thus the Vyavahāramayūkha had come to be recognised as a work of paramount authority in Gujerat at the time of the advent of the British in the first decades of the 19th century. It appears that even in Northern India the Vyavahāramayūkha was referred to by the British

1. Vide *Rakhmabai v Radhabai* 5 Bom H C R (A. C. J.) 181 at p 185, *Narayan v Nana* 7 Bom. H C. R. (A. C. J.) 153 at p 169, *Krishnaji v Pandurang* 12 Bom. H C. R. 65, at pp. 67 — 68, *Jankibai v Sundra* 14 Bom. 612 at p 616 (a case from Ratnagiri).

2. *Lallubhai v Mankuvarbai* 2 Bom 388 at p 418, *Jankibai v Sundra* 14 Bom 612 at pp 628 — 624, *Vyas Chimanlal v Vyas Ramchandra* 24 Bom 367 (F. B.) at p 373.

3. *Gogabai v Shrimant Shahaji Rao* 17 Bom 114 at 118, *Bar Kesserbai v Hunsraj* 30 Bom 431, 442 (P. C.), *Bhagwan v Warubai* 32 Bom 300 at p 312.

4. Vide Introduction to the edition of the text of the Vyavahāramayūkha p. XLIII n 1 (Bhandarkar Institute) where the letter is set out in full.

5. Vide *Lallubhai v. Mankuvarbai* 2 Bom 388, pp 418 — 419 and *Bhagirthibai v. Kahnugirao* 11 Bom 285 (F. B.) at pp 294 — 295 for the reasons of the pre-eminent position of the Vyavahāramayūkha in Gujerat and in Bombay island.

courts as early as 1818 A D¹

As the Vyavahāramayūkha is said to be of paramount authority in northern Konkan and as it considerably differs from the Mitākṣarā in matters of inheritance and succession it is of great practical importance to settle with precision the exact limits in northern Konkan up to which the Mayūkha must be regarded as supreme. It has been decided that Karanja, an island opposite the Bombay harbour is governed by the principles of the Mayūkha² that Mahad the southernmost Taluka of the Kolaba District is not under the paramount influence of the Mayūkha and that the predominance of the Mayūkha cannot either on principle or authority be taken further south than Ohaul and Nagothma (in the northern part of the Kolaba District³)

Though the authority of the Vyavahāramayūkha is supreme in Gujerat in the island of Bombay and in northern Konkan and high in the Maratha country it is not to be supposed that the whole of it has either been accepted by the people or adopted by the courts. There are several matters such as the twelve kinds of sons the fifteen kinds of slaves and the marriage of a person with girls belonging to lower castes than his own on which Nīlakanṭha dwells with as much learning and seriousness as any ancient writer although those usages had become obsolete centuries before his day Nīlakanṭha says that the paternal great-grand father the paternal uncle and the half brother a son succeed together as heirs But the courts have never recognised this rule nor has that view ever been made the foundation of a claim in a court of law⁴ Nīlakanṭha, following his father Saṅkarabhaṭṭa says that a daughter's son or a sister's son can be adopted even by a person belonging to the three twice-born classes But the Bombay High Court owing probably to misapprehension as to the correct meaning of a highly abstruse passage of the Mayūkha (pp. 112-113 of the present translation and notes thereon) holds that the Vyavahāramayūkha is opposed to the adoption by the regenerate classes of the daughter's son and sister's son.⁵

1. Vide *Dhagraningh v Dhagran* 17 All. 291 at p. 311

2. Vide *Saikharam v Saibaf* 3 Bom. 37.

3. Vide *Varner v Dhan* 40 Bom. 631 (where the authorities are collected).

4. Vide *Rahi v Govind* 1 Bom. 27 at p. 112 and *Rahi v Mohanarao* 1 P. M. 101 at pp. 470 and 477

5. Vide *Gopal v Hanumanth* 3 Bom. 213 at p. 220, and *Singh Chaudhary v Singh Ram and Co* 21 Bom. 413 at p. 420.

ABBREVIATIONS.

Āt. br. = Āitareya-brāhmaṇa

Āp. Gr. S. = Āpastamba-grhya-sūtra

Āp. S'r. S. = Āpastamba-s'rauta-sūtra

Baud Dh S. = Baudhāyana-dharmasūtra

B. I. = Bibliotheca Indica series

Bor. = Borradaile's translation of the Vyavahāramayūkha contained in Stokes' collection

Br. = Brhaspati, translated by Dr. Jolly in Sacred Books of the East, vol. 33

B. S Series = Bombay Sanskrit series

C P Code = Civil Procedure Code

Dh S. = Dharmasūtra

D M = Dattakamimāmsā

Kāt. = Kātyāyana (text reconstructed by P. V. Kane with translation and notes)

Mit. = Mitāksarā

Nar. = Nārada in S. B. E.

Nil = Nilakanṭha

Par. M. = Parāś'ara-Mādhaviya (Bombay Sanskrit Series)

Rg. = Rgveda

S. = Stokes' collection of Hindu Law Books

S. B. E. = Sacred Books of the East series

Sm. C = Smṛti-candrikā

Tai. Ā. = Taittirīya Āanyaka

Tai S = Taittirīya Samhitā

Vāj. S. = Vājasaneyasamhitā

V. C. = Vivāda-cintāmanī

Vir = Vīramitrodaya (Jīvananda's edition)

V. M = Vyavahāramayūkha (edited by P. V. Kane with notes in the Govt. Oriental Series, Bhandarkar Institute, Poona)

V. R. = Vivāda-ratnākara

Vy. Māt = Vyavahāramātrkā (edited by Śrī Asutosh Mukerji)

Yāj. = Yājñavalkya-smṛti

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ERRATA

A B — A few obvious misprints have not been given here.

18 *n*₁ *read* ' pas'ustri-bhā a ' *for* ' pas'ustriyo '

36 II 26-27 *read* ' that (for not pointing out of the faults either) *for*
' that for not pointing out the faults either '

58 lines 1 and 16 *read* 18 *for* 19

94 *n*₂ *read* 2 Bom. 191 *for* 2 Bom 401

97 *n*₁ *read* ' anuloma ' *for* ' pratiloma '

175 l 10 *read* ' since from another text ' *for* ' since another text '

183 *n* *read* ' p. 119 *n*₁ ' *for* ' p 719 *n*₁ '

199 *n* *read* ' *Sundarzm* v. *Ramsamia* '

212 *n*₂ *read* ' Yāj. II 11. ' *for* ' Yāj. II. 12 '

THE VYAVAHĀRAMAYŪKHA

Composed by

BHATTA NĪLAKANTHA

1 Having spoken of the ways of royal policy and fittingly bowed to the lotus-like feet of the refulgent (Sun), Nilakantha composes a little (work) on the disposal (decision) of *vyavahāra* (judicial proceedings)

2 I contemplate my revered (father) S'ankara, the only leader among the best of Brāhmanas, who looked after the religious practices (of the people), who was endowed with happiness, who was the teacher of all in Kāśī (Benares)

3 That highest Person, who appeared in two forms in this world for propounding two conflicting paths (systems), has here (now) accepted the non-difference of (the views of the two) Mīmāṃsakas, (being born) in one form as Bhatta S'ankara

4 There are certain (doctrines) here which are accepted by some who lead (people) astray; I have discarded them as they are baseless. On account of this (discarding) there is no deficiency of treatment in this (work), worship does not become deficient by the absence of the flower of the sky

V 1 'Having spoken policy'—This refers to the composition of the Nītimayūkha, which immediately preceded that of the Vyavahāramayūkha

V 2 This verse also applies to god S'ankara by means of *śleṣa* (Paronomasia). The words द्विजराज, वृष, शिवाङ्गित are paronomastic. The verse (with S'ankara) means 'I contemplate (the god) S'ankara, who has the moon as the only thing (by way of decoration) on his head who is the lord of the Bull, who is accompanied by Pārvatī (called S'ivā), who is the inspirer of all in Kāśī and who is an object of worship'. S'iva is the presiding deity of Benares

V 3 For detailed explanation of this verse, vide notes to V. M. pp. 1—3. The two Mīmāṃsakas are Prabhākara and Kumārila. Nilakantha claims that his father explained away the differences between the views of Prabhākara and Kumārila. Mandlik's explanation that the first half of the verse refers to S'ankara and Kumārila and that the latter half says that S'ankarabhaṭṭa accepted the identity of the human-soul with the divine-essence propounded by Vyāsa is far-fetched and wrong. The doctrine of *advaita* was not propounded by Mīmāṃsakas properly so called and Vyāsa and his school are hardly ever designated Mīmāṃsakas.

V 4. Khapuspa (sky—flower) is a symbol of what is absolutely non-existent. Vide notes to V. M. p. 3 for khapuspa.

Vyavahāra is an action or operation that facilitates the exposure of the wrong that is not known (at the time when the operation begins as belonging to one) and that pertains to one out of the several persons that have a dispute (about it), or it is an operation in which the plaintiff and the defendant are the agents in which possession, witnesses and (other) means of proof are applicable (according to circumstances) and which helps the establishment (of truth) in the midst of conflicting alternatives. According to the *Madanaratna* in the case of a reply of confession¹ (to the claim of the plaintiff) the term *vyavahāra* is applied (only) in a secondary sense. The latter part² (of the above definition) serves the purpose of excluding (from the denotation of *vyavahāra*) *vāda vitandā* and the like.

Now (as to) the titles of *Vyavahāra*. Now (as to) its divisions, *Yājñavalkya* says (2 5)

If one invaded by others in a way that is in conflict with the *smṛiti* and established usage complains to the king, that becomes a subject of *vyavahāra*.

The word *ādharpatā* means ill-treated despised

Manu (8 4-7) speaks of eighteen divisions of the subjects of *vyavahāra*

Of them the first is (1) the non-payment of debts (then) (2) deposit (3) sale by one who is not the owner (4) partnership (5) resumption of gifts, (6) non-payment of wages (7) breach of compacts or conventions (8) rescission of purchase and sale (9) dispute between master and hardman (10) rules about boundary disputes (11 12) harshness of bodily injury and speech (i.e. assault and defamation) (13) theft (14) violent offences (15) adultery (16) duties of husband and wife (17) partition (18) gambling and prize fighting. These are the eighteen subjects here in the sphere of *vyavahāra*.

Anapākarma means not giving *ānusaṃh* means repentance (i.e. rescission). *Dyūtam* means playing by means of inanimate objects (like dice) (while) *saṃdāhvaya* means gaming by means of animate objects. In this (above) passage adultery and harshness of speech and assault are separately

1. Reply of confession.—When a plaintiff lodged his complaint, the defendant had to give a reply which was of four kinds, viz. a total denial (*mitīyā*) a confession or admission of plaintiff's claim (*akṣipratipatti*) a plea of cause (i.e. accepting the whole or part of the plaintiff's averments and meeting them with a counter cause) a plea of *res judicata* (*prāṇ nyāya*). When the defendant admits plaintiff's claim, there is no necessity to employ means of proof and to establish the truth by reasoning. Hence the definition of *vyavahāra* in which the plaintiff ... alternatives cannot primarily apply to such a proceeding.

2. The latter part i.e. the words in which possession ... alternatives. For explanation of *vāda* and *vitandā* vide notes to V. M. pp. 4-5. These are technical terms in *Nyāya*. In both there are disputants but in *vāda* the *pramāṇas* are *prāṇ* a *śaṃkhāna* etc. and not possession &c. in *vitandā* (mere cavilling) there is no attempt to find out the truth, but there is simply a desire to ridicule and vanquish one's opponent.

mentioned (from *sāhasa*) according to the maxim of the cattle and the bull¹, though they are (mere) varieties of *sāhasa* according to the dictum of Brhaspati (p 359 v 1):

Sāhasa is of four kinds, viz killing a man, robbery, intercourse with another's wife and harshness of two kinds

The nature of these eighteen (divisions) will be explained later on.

Now the summary of the fundamentals² of vyavahāra (judicial procedure).

Brhaspati (p 279 v 18) says:

(The king) should construct a separate building in his fort, with water and trees near it, (and) on the eastern side of it he should prepare the court-room, facing the east and possessed of all the good characteristics (of a *sabhā*).

* The same (i e *sabhā*) is (styled) dharmādhikarana (hall of justice), as the text of Kātyāyana says

That place, where the sifting of truth and falsehood after deliberation in accordance with *dharmas'āstra* (the science of law) is authoritatively made is the *dharmādhikarana* (the hall of justice)

Manu (8 1--2) says:

The king desirous of investigating judicial proceedings should enter the *sabhā* (court), being well-mannered and wearing a dress and ornaments befitting good breeding, along with ministers well-versed in state policy and with brāhmanas, (and) should look into the causes of the litigants.

Yājñavalkya (2 1) says:

The king, being free from anger and avarice, should investigate judicial proceedings along with learned brāhmanas in conformity with *dharmas'āstra*

(The word) ' nrpāh ' (means) any one whatever (of any caste) having authority to protect the subjects and not merely a *ksatṛiya* (a man of the warrior caste) Kātyāyana (says)

The king who looks into (the judicial proceedings) together with the judge, the councillors, the brāhmanas, the family priest and the *sabhyas* (assessors, respectable men) reaches heaven on account of (his having followed) *dharmā* (the dictates of righteousness)

1. ' The maxim of the cattle and the bull ' — For detailed explanation *vide* notes to V. M. p 6 When a man says ' let cattle be brought and bulls also ', this mode of expression is employed to draw special attention to the intractability of bulls, though the latter are included in the generic term ' cattle ' So robbery and adultery are separately mentioned apart from *sāhasa* by Manu, though they are varieties of *sāhasa*, in order to draw special attention to these important heads of *vyavahāra*.

2. The word *mātrikā* means ' fundamentals, basis '. Jīmūtavāhana's work dealing with general rules of procedure and the means of proof is styled *Vyavahāramātrikā*,

* P 8 (text)

In this passage (the word) *hrāhmaṇa* (means) one who is not appointed (as a member of the court to decide causes) while *sabhyas* (assessors) are those who are appointed (by the king to decide causes) And to the same effect it has been said (Nārada p. 36 v 2)

One who knows *dharma*, whether appointed or not must speak out (what the decision should be¹)

Bṛhaspati (278 v 12) declares the definition of (*prādevāka*) a judge —

He who in a controversy asks questions and also cross-questions and who is the first to speak (to a litigant) in a sweet manner is therefore known as *prādevāka*

* Vyāsa declares the definition of *amātya* (councillor)

The king should appoint as *amātya* a person of the regenerate classes who knows all the *śāstras* who is not avaricious, who utters what is just who is a *hrāhmaṇa* who is wise and to whom the office comes hereditarily

In this passage the word *divya* (a man of the regenerate classes) is used again (even after the word *vipra* a *brāhmaṇa*) for the purpose of including a *kṣatriya* or a *vaiśya* (for appointment as minister²) in the absence of a *brāhmaṇa* To the same effect (is) Kātyāyana

Where there is no learned *brāhmaṇa*, (the king) should appoint a *kṣatriya* or a *vaiśya* who is proficient in *dharmaśāstra* (but he) should carefully exclude a *śūdra*

And Yājñavalkya (2-2) says as regards *sabhyas* (members of the court)

The king should appoint as members of the *sabha* (court of justice) those who are endowed with Vedic learning who are learned in *dharma* (law) who speak the truth who do equal (justice) to friend and foe

As regards their number Bṛhaspati (p 278 v 11) says

That *sabha* (court) where are seated seven five or even three *brāhmaṇas* who are conversant with worldly affairs and who are learned in the Vedas and in *dharma* (law) resembles (in holiness) a *yajña* (sacrifice)

The same author (p 279 v 14) says

The king should appoint as *ganaka* (accountant) and *lekṣaka* (scribe) two persons who are versed in the principles of grammar (*śabda*) and lexicography (*abhidhāna*) who are proficient in reckoning (casting figures) who are pure and who are acquainted with various alphabets

1 On the words 'appointed and *sabhyas* vide notes to V M pp. 10-11

2 Bṛhaspati, as quoted in the Vyavahāramāyika of Jimūtavāhana says in a sacrifice is honoured Viṣṇu while in *sparsāṅgāra* the king (is honoured) there (in sacrifice) the sacrificer is the successful (party) and the animal (sacrificed) is the vanquished party (as in a litigation) the plaintiff and the reply are the clarified butter and the conclusion is (kaiṣ) the offering the Śāstra (dharmaśāstra) the Veda and the *sabhyas* are the sacrificial priests who receive *dakṣiṇā* (payment for acting as adjudicators)

'Śabda' means the science of words (i.e. grammar); 'abhidhāna' (means) a lexicon Kātyāyana says:

There merchants should be appointed to listen (to the evidence) and to decide what is just

Patra (means) 'in the court' Brhaspati (p 279 v 15) says;

(The king) should appoint his own truthful man (servant) who will be subject to the control of the *sabhyas* for summoning and looking after the witnesses, the plaintiff and the defendant

* This (officer) should be a *s'ūdra* To the same effect is Vāsa.

The king should appoint as *sādhyapāla* a strongly built *s'ūdra*, who helps (in arriving at) the truth (by summoning witnesses &c), who holds the post hereditarily and who acts under the orders of the *sabhyas*

Yājñavalkya (2 3) says

A king who cannot, owing to pressure of (other) work, look into the causes (of litigants) should appoint (to administer justice) a *brāhmaṇa* learned in all *dharma* (law) along with *sabhyas*

Brhaspati (p 278 vv 6 and 8) declares the duties of the king and the presiding (judge):

The presiding (judge) is to declare (the decision), the king is to punish (to execute the punishment), the *sabhyas* to investigate the causes, the accountant is to count the money (or to cast figures) and the scribe is to write down the (legal) proceedings

The same author (Brhaspati p 279 v 16) says:

The king should sit facing the east, the *sabhyas* facing the north, but the accountant should face the west and the scribe the south

Yājñavalkya (2 30) speaks of determining agencies other than the royal court

In matters of judicial proceeding among men each preceding one (out of the following), viz the (judges) appointed by the king, the *pūgas*, the *s'reṇis* and the *kulas*, is superior (in authority)

The words 'nrpenādhiṁktāḥ' mean 'the *prādvivāka* and others.' 'Pūgāh' (means) the 'assembly of men living in the same village, earning their living

1 For detailed explanation of *pūga*, *s'reṇi* and *kula*, vide notes to V M pp 12-14 *Pūga* was somewhat like a village *panchāyat*, *s'reṇi* was a guild of persons belonging to the same caste and pursuing the same calling, such as a guild of oilmen or weavers. 'Kula' means the kindred of the parties constituted into a court Nārada (I 7) also says that *kula*, *s'reṇi*, *gana*, the judge (appointed by the king) and the king were the sources of justice, each of superior authority to the preceding one and Brhaspati as quoted in the *Vīramitrodaya* (p, 40) says that *kula*, *s'reṇi* and *gana* may investigate all causes other than those of *sāhasa* (heinous wrongs in which an element of force is involved).

* P. 5 (text)

by various callings and belonging to different castes And s'renis are the opposite of pūgas Kulāni (means) the assembly of castemen, relatives and blood relations Bṛhaspati (p 281 v 25) also says

For those who move about in the forest a court should be held in the forest for soldiers in the army and for merchants in the caravans.

* Karaṇa (means) sabhā (court) Kātyāyana mentions the (proper) time for investigating judicial proceedings

The king putting down his foes should decide the causes conformably to the rules laid down in the śāstras in the court and in the first half of the day The three parts¹ of the day omitting the (first) eighth part of it are declared to be the best time for (investigating) judicial proceedings as laid down in the śāstra*

The eighth part is half of the first watch (of the day) the three parts are those that are subsequent to it and precede mid-day And Samvarta declares the tithis (lunar days) that are to be omitted (for investigating judicial proceedings)

The wise should not look into judicial proceedings on those tithis viz the 14th day (of the two halves of the month) the new moon the full moon and the eighth

Bṛhaspati (p 280 v 23) says

Having occupied that (court) in the first half of the day along with the old the councillors and dependents he (the king) should investigate (judicial proceedings) and should listen to (the expostitions of) puruṣas dharmaśāstra and arthaśāstra

Tam (means) the sabhā (the court) Arthaśāstra² (means) the science of politics. Nārada (p 15 v 39) declares (a rule of preference) in case of conflict between dharmaśāstra and arthaśāstra

Where there is a conflict between dharmaśāstra and arthaśāstra one should do what is laid down in the dharmaśāstra and discard the dictates of arthaśāstra

But in case of conflict between two texts of dharmaśāstra Yājñavalkya (2 21) says

1 The three parts &c —the idea is that the day (of 12 hours) is to be divided into eight parts (of 1½ hours each) and the court was to be held after the first part (of 1½ hours) and before midday (i.e. roughly between 7.30 A.M. and noon).

2 Arthaśāstra —Mandlik and Bor. translate this as 'moral laws' but this is wrong. The well known work of Kauṭilya on politics and state administration is styled arthaśāstra.

In case of conflict between two smrtis reasoning (or decision) based upon the practices (of the old) is of greater force (or authority¹).

* Brhaspati blames him who does not take reasoning into consideration (but merely follows the letter of the texts):

The decision (of the case) should not be given by merely relying upon sūtra, for in the case of a decision void of reasoning loss of *dharma* results

Brhaspati (p. 287 vs 28-31) says that the (king) should take into consideration the usages of the country and the like:

The *dharma*s (modes of right conduct or usages) of a country, caste or family that were introduced in by-gone times should be preserved intact (as they are), otherwise the subjects become agitated (they resent interference in their usages); people become disaffected and the forces (strength or army) and the treasury (of the king) become depleted. The maternal uncle's daughter is accepted in marriage by brāhmanas of the south; in *madhyades'a*² (central India), (brāhmanas) become hired labourers and craftsmen and eat cow's flesh, eastern (brāhmanas) eat fish and then women are addicted to illicit intercourse; in the north women are addicted to drinking and can be touched by men even when in their monthly courses. On account of the acts (specified) these (in their respective countries) should not be liable to undergo *prāyas'citta* (penance) or to incur judicial punishment.

The word 'pūṇe' means 'living in the east'. In some (works) the reading is 'sarve' (for 'pūṇe') 'Sarve' (means) brāhmanas and (men of) other (castes), 'damah' means 'dandah' (legal punishment), some (writers) maintain that the mention in some smrtis of *prāyas'citta* and the like in the case of these acts applies to countries not mentioned in this passage (of Brhaspati), while others who explain ('*prāyas'cittadama*') as the punish-

1. The Mit explains that in case of conflict between two smrtis texts ratioecination which assigns to each of them its proper place by looking upon one as containing the rule and the other as containing the exception (and such other methods of interpretation) is of superior force, being based upon the practice of the old (who pursue the rule laid down in one text and avoid the other). Nyāya means 'rule of interpretation'. The word 'nyāya' may also mean 'the decision'. In that case the meaning is that in case of conflict between two smrti texts, the rule of decision should be to find out what the usages of the people are and to decide accordingly. Viśvarūpa gives two other senses of this passage and reads 'smṛter virodhe'. This text of Yāj contains a rule somewhat similar to the doctrine that equity rather than the bare letter of the law should be followed. In *Bhav v Sundarabai* Bombay Printed Judgments 1874 p 250 at pp 251 and 252 the texts of Yāj II. 21 and Br are referred to and the text of Yāj is translated as 'usage is of force for their construction'. Vide also *Chunilal v Surajram* 33 Bom 433 at p 439 (=11 Bom L R. 708) where it is said that Nīlakantha cites Yājñavalkya's text that where there is a conflict between two or more smrtis that one should be accepted which is conformable to equity.

2. Madhyades'a is the tract between the Himālaya and the Vindhya, to the east of the place where the Sarasvatī disappears and west of Prayāga (Allahabad). Vide Manu, I. 21.

* P. 7 (text)

ment which serves as *prāyas'citta* say that (the passage lays down) the mere exemption (of those people) from legal punishment while in other countries both legal punishment and penance will have to be suffered¹ Vyāsa (says)

The decision (of a litigation) between merchants *craftsmen* and such others and between those who subsist on agriculture and the stage cannot be given by others (who know nothing of these avocations), but it should be assigned to those only who are well versed in these (avocations)²
Manu (8 390) says

The king who desires his own welfare should not (himself) declare a special decision in the case of men of the three higher castes who have a dispute among themselves in connection with the orders (*śāstras*) to which they belong (i.e. as brahmacārins, householders &c)

Kātyāyana (says)

At the (proper) time (the king) should question the petitioner who bows to him and stands before him what is your business and what is your grievance, do not be afraid and speak out man! By whom where when and from what (motive were you troubled) ? Thus he should question the (applicant) when he comes to the court. Having considered along with the *śābhyas* and the *brāhmanas* what he speaks when thus questioned (the king) if the cause be proper should then hand over to him (to the applicant) a seal (i.e. order under seal) or should order the servant (called *śādhyapāla* above) for summoning (the defendant)³

Nārada (p 17 v 47) says

The applicant who has a dispute may put under restraint or arrest (the defendant) who does not stand up to meet (i.e. who absconds or avoids) the claim that is to be investigated or who minds not the words of the claimant till the approach of the summons (i.e. the sealed order or the *śādhyapāla*)

1 According to the plain words of the text the doing of the various acts in the respect to countries does not render the people liable to incur punishment nor to undergo *prāyas'citta* some say that they escape only punishment at the king's hand (but are liable to undergo *prāyas'citta*) in the countries, while in other countries people guilty of these acts would be liable to undergo both *prāyas'citta* and legal punishment. People guilty of offences were supposed to be purified by undergoing punishment at the hands of the king (i.e. legal punishment was a kind of *prāyas'citta*) 1. cf. Manu 8. 318.

2. Vido *Shankunathji in the Bank of Bombay* L. R. 31 Bom. 2, 8 (= 11 Bom. L. R. p. 250) where this passage is quoted and it was held that where the manager of a family firm borrowed for the family firm without legal necessity the debt would be binding even on minor members. Mandlik translates *raṅgavāṭī* as among dyers but this is wrong. The usual meaning of *raṅga* is theatre or stage. Mandlik himself on p. 21 translates *raṅgavāṭī* as performer on the stage. This text does not mean that the king is not to decide those matters but that he should not decide them hastily without the aid of experts.

3. In Sanskrit the same word is used for plaintiff and complainant, as there was no clear-cut distinction made in ancient India between civil and criminal courts and procedure.

The same author (Nārada p 17 v 48) mentions four kinds of (āsedha) restraints (by the applicant, of the defendant)

Confinement to a place, restriction as to time, preventing from going on a journey and prohibition from doing certain specified acts (such as exposing goods for sale), restraint is thus of four kinds. One thus subjected to restraint should not transgress it¹

The same author (Nārada p 18 v 51) lays down the punishment for him thus restrained who transgresses the restraint

One who is arrested being fit to be arrested and who transgresses it deserves punishment

*The same author (Nār p 235 v 13) declares that in some cases the person who restrains (the defendant) himself incurs punishment

He, however, who inflicts restraint (upon the defendant) in such improper ways as stopping the senses or (stopping) speech or breathing deserves to be punished and not (he who breaks away) from such restraint.

Nārada (p 18 v 49) declares the absence of punishment in certain cases even when (the defendant) breaks through the restraint.

One, who is placed under restraint while crossing a river or when in an impassable forest, or in a difficult place or in an over-whelming calamity (overtaken by *vis major* or king's enemy) and the like, shall not be guilty of an offence if he breaks away from restraint by another (in such cases)

Kātyāyana prescribes punishment for him who puts under restraint those that do not deserve to be restrained

He that restrains another not liable to be restrained should be punished by the king, this is the established rule

The same author enumerates those who ought not to be restrained

Those who have climbed up a tree or a mountain, those who are seated on an elephant, horse, chariot or vessel and persons placed in a dangerous situation; all these should not be subjected to arrest by those who seek to establish their claims; as also persons afflicted with diseases or misfortunes and one who is engaged in a sacrifice

Nārada lays down the following rules as to summoning (the defendant)²

The king should not cause to be summoned the diseased, minors, the old, persons in a difficult situation, persons engaged in religious duties, one who would be seriously injured (if then summoned), one who is under a calamity (a bereavement &c.), one who is engaged in the king's business or in celebrating a (religious) festival, persons intoxicated or possessed,

1 Compare section 95 of the O. P. Code of 1908

2 These verses are ascribed to Kātyāyana by the Vir (p 52) and to Hārta by the Smṛticāndrikā and are not found in the printed Nārada, but compare Nārada I, 52-54,

* P 2 (text)

med men those involved in grief servants, nor a young woman who has no relatives a woman of a respectable family a woman who is recently delivered a maiden of the highest caste, (because) these (females) are declared to be dependent on their kinsmen (and their kinsmen should be summoned and not they) It^r is allowable to summon those women upon whom their families are dependent those who are profligate and who are prostitutes, as also those that have no family (i.e. who are of low birth) and those that are sinful Having understood the matter complained of the king should summon in weighty matters even ascetics who have repaired to a forest but without offending them Taking into consideration the time and the place and the importance or otherwise of the causes the king may very slowly cause to be brought even the diseased and others (enumerated above)

In some (copies) the reading is *yānāḥ* (in palanquins or other conveyances) for the word *śānāḥ* (slowly) A person who being summoned does not attend should be punished And to the same effect is *Bṛhaspati* (p. 288 v 85)^r

Where a person being summoned and having relatives and family¹ does not attend through arrogance the king should fix a punishment for him according to the (importance of the) matter in controversy

Kātyāyana prescribes different fines according to the difference in the matters of controversy (for not attending when summoned)

If the matter be insignificant the fine shall be fifty (*panas*²) if it be of a middling character the minimum fine should be one hundred, in serious matters the fine should always be not less than five hundred (*pañcaś*)

Pitāmaha speaks of what is to be done after the arrival of the person summoned

The person complained against (i.e. the defendant) together with the plaintiff should be made to stand in front of the court

The instrumental (in *vādinā*) is here used in the sense of together with (and not in the sense of agent) *Kātyāyana* says

There (in the court) the complainant (or plaintiff) should first speak out (his case) and after him the defendant At the end of both the members of the court (the assessors) should speak out (their views) and after them the presiding judge (*pradivādaka*)

Bṛhaspati (p. 290 v 4 and p. 288 v 34) says

When a plaintiff and his opponent (or several pairs of plaintiff and their opponents) approach (the court) each saying I should be heard first

1 Relying on the support of his relatives or his noble birth he treats with scant courtesy the summons and hence he is to be punished for contempt

2 *Kātyāyana* as quoted in the *Sm. Q.* say that wherever a figure is mentioned a fine for a wrong and nothing more is specified the figure refers to *panas*. Vide notes to *VI p 12*

P 10 (text) 3 P 11 (text)

the plaints should be recorded in the order of the castes (of the applicants) or after considering (the gravity of) the wrong (in each case) In the case of persons who are not bold (or mature in intellect), who are idiots, insane, infirm on account of old age, women, minors or diseased, a relative or some other person appointed (to represent them in the litigation) may declare the plaint or the reply¹

Nārada (p 29 v 22) says .

Whether a person be appointed by the plaintiff or be instructed (to appear in court) by the defendant, success or failure belongs to him for whom he carries on the litigation

As to the text of Kātyāyana (this is Nārada p 29 v 23),

Where a person, not being a brother or father or son or a servant, undertakes another's litigation and speaks out (generally falsely) in judicial proceedings, he is liable to be punished,²

it refers to persons who are not appointed (as agents) The same author declares that in certain cases an agent (to conduct a litigation) cannot be recognised (by the court)

In (judicial proceedings for) the killing of a brāhmana, drinking liquor, theft, adultery with preceptor's (elder's) wife, manslaughter, theft, touching (violating) another's wife, eating forbidden things, seduction and defilement of a virgin, violence (of language and actions i.e. slander and assault), forgery, treason, no deputy (or substitute) shall be given and the party who does the act shall himself carry on the cause

(In the above passage) the word 'steya' (theft) is repeated in order to lay down an absolute prohibition of a deputy (in the case of such offences as theft³) *'Prativādi' means 'pratindhi' (a substitute or deputy)

When the defendant is brought (before the court) Yājñavalkya (2 6) describes what is to be done by the plaintiff

What was alleged by the plaintiff before the defendant was called should be written down in the presence of the defendant and should be marked (furnished) with the year, the month, the fortnight, the day, the names (of the parties), then caste and the like

1 This verse makes provision for the appointment, in the language of modern law, of a next friend or a guardian *ad litem* for minors, idiots and insane persons and recognised agents Compare C P. Code of 1908, Order 82 for the former and Order 9 r. 1--2 for recognised agents

2 This verse lays down a rule that resembles the English law of champerty and maintenance

3 The Vir tells us that this is the explanation given by the Madanaratna, which seems to have been followed by Nīlakanṭha The Vir itself prefers to explain the first word 'steya' as standing for the theft of gold (which was one of the five mortal sins according to Manu XI 54) and the second 'steya' for theft in general This explanation is better as the first word 'steya' is placed in the midst of the other mortal sins,

* P 12 (text)

In another *smṛiti* (it is said)¹

That is termed *bhāṣa* (plaint or complaint) which is presented to the king and which exhibits an *artha* (cause of action), which is possessed of the good characteristics (of a *plaint* such as being concise to) which is full (i. e. fully states the subject matter of litigation), which is free from ambiguity, which distinctly states the point to be established, the words of which are employed in their primary sense (and not figuratively), which conforms to the statement made (at first before the defendant came), which deals with things well known (i. e. is intelligible to any ordinary person), which contains no inconsistencies, which is definite (and not vague) and capable of proof, concise and (yet) exhaustive, which is not impossible with regard to place and time, which contains the year the season the month, the fortnight the day the hour the country the district the village the house the name or description of the subject matter of dispute the caste the personal appearance age the measure and quantity of the subject matter the names of himself (the plaintiff) and the defendant, which is marked with the names of ancestors of himself and of the opponent and the names of several kings (during whose reign the parties and their ancestors lived), which states the reasons for forbearing (to sue for some time) and the loss caused to himself, which narrates (the names of) the original receiver (donee) and donor

The use in the case of pledge and the like of the year and the like occurring in this passage will be stated (later)² The use of the country and the like in some cases is declared in another *smṛiti*

In suits for immoveable property these ten should be entered (in the *plaint*) viz the country the village, the site (i. e. with boundaries) the caste and names (of the parties) the neighbour the dimensions and the name of the field the names of "the father and grandfather (of the parties) and mention of former kings

Kātyāyana (says)

The *prādīvāka* (judge) should write down on a board with chalk the plaintiff's statement as made by him in a natural manner and then on a leaf (or paper) after it is amended.

¹ These verses are ascribed to the *Bauddhahikā* in the *Smṛticandrikā* the *Parā* are *mādhaviya* and *Vīr* With these requisites of a *plaint* may be compared Order VI rules 2, 3 and Order VII rules 1 3, 6-7 of the C. P. Code.

² This may also mean 'which contains no digressions'

3. The statement of the year month &c is not useful in all judicial proceedings, but only in some, such as those about sales, gifts and mortgages e. g. if the same property is twice mortgaged the first prevails over the second and hence the years of the transactions are important. The author refers to the verse of Kātyāyana quoted by him in the section on *Adhikānam* dvāro ya tu The *Sm C* and the *Vīr* ascribe these verses to Kātyāyana.

Nārada (§ 25 v. 7) declares the time for amendment (of the plant)

He (the judge) may amend the plant as long as the reply (of the defendant) is not presented. Amendment (of the plant) should cease when it (the plant) is denied by the reply. As long as the defendant does not enter his reply to the plant so long the plaintiff may cause to be entered (in the plant) whatever matter may be desired to be expressed by him.

These form the characteristic of a (proper) plant fault² plants that are of an opposite nature to it (to a proper plant) are (expressly) declared in another smṛti³ though they follow as a matter of course (impliedly).

The king should reject a faulty plant viz. one which is unknown, that discloses no injury (of which the court could take cognisance), that is meaningless, that gives no cause of action (to the plaintiff) that is incapable of proof, that is self-contradictory.

' Apras dāha ' (exemplified by) ' my skyflower has been stolen ', ' mṛtibhā ' (disclosing no injury) by ' he works with the light of my lamp ', mārthā (is exemplified) by ' my *lacatātapa* was stolen ' ; ' mṣpavojana ' (by) ' my neighbour studies with fine intonation ', ' asādhya ' (by) ' I was derided by this man with a knit eyebrow ', ' viruddha ' (by) ' I was abused by a dumb man ', ' viruddha ' also means ' what is opposed to (the usages of) a town or country ', as is declared in another smṛti.

That which is forbidden by the king, what is opposed to (the interest of) the citizens or of the whole nation and also of the councillors ; others again which are opposed to a town, village, or large groups of people ; all these causes are declared to be inadmissible (i. e. such plants as the king would not entertain)

Nor can it be said that if a plant contains more matters of grievance than one it would be a faulty plant, as to hold so would be in conflict with the *dictum* of Kātyāyana :

A king from a desire to find out the truth should undoubtedly admit even that plant which contains many propositions (grievances) if it is definite so far as judicial procedure is concerned (i. e. each proposition is supported by distinct evidence)

1 For amendment of plaintiff, compare Order 6 rule 17 of the C P Code

2 This verse alone occurs in the printed Nārada (2-7).

3 ' Faulty plants mean plants that appear to be so but are really faulty and would be rejected by the court '.

4 The Vir ascribes this verse to Kātyāyana. For skyflower, vide above notes on introductory v. 1, ' la ca ta pa ' are the first letters of the five classes of consonants and the collocation of these makes no sense. Vide notes to V M p 21 and p 25 and Kāt, v. 140 for detailed explanations of these terms,

* P, 11 (text).

As to the text —

A plaint containing several *padas* (*vyavahāra-padas* causes of action) cannot hold good

it is to be explained as meaning that such a plaint (containing several causes of action) cannot be simultaneously proceeded with (as to all causes) but only step by step (i.e. the causes will be investigated one after another¹)

The plaint being thus reduced to writing Yājñavalkya (27) describes what is to be done thereafter

The reply (of the defendant) who has heard the matter (of complaint) should be written down in the presence of the plaintiff

*Nārada defines the reply (of the defendant)

Men versed in the (law) hold that to be a (proper) reply which meets (all the points raised in) the plaint which is pithy (or reasonable) unambiguous not inconsistent (with itself) which is intelligible without explanation.

Kātyāyana mentions the four varieties of it (i.e. of the reply)

A reply is of four kinds viz. either by denial (of the allegations in the plaint) by confession (or admission) by a special plea or by the plea of a former judgment (i.e. by the plea of *res judicata*)²

*The same author defines a reply of denial

If the defendant should deny the claim (of the plaintiff) that reply is known in judicial procedure as one of denial.³

The same⁴ author declares that (the reply of denial) to be of four kinds

This is false I do not know I was not present then I was not born at that time, thus the (reply by) denial is of four kinds.

The answer by confession is described in another śūtri

Statement (by the defendant) of the truth of the claim (made by the plaintiff) is declared to be the answer by confession

Nārada defines the reply of special plea (or admission and avoidance)

If the defendant admitting the allegations set out in the plaint puts forward a plea it is known in the śūtris as a reply of special plea

Kātyāyana describes the reply of former judgment

1 This is a dictum of Kāt. Vyana. For explanation of these two dicta of Kātyāyana vide notes to V M pp. 25-30 and Kāt. vr. 186-187

2 This is not found in the printed Nārada.

3 Compare the very similar words of Nārada p. 2. v. 4

4 This is ascribed to Dharmapati by the Vy. Māt. and Par. M

5 This is the same as Nā. p. 6 v. 5.

P 10 (text)

If (a person), action, letter) detected in a judicial proceeding, again has (plant) written out, it should be addressed 'you were formerly detected': this is called the plea of former judgement.

These being the characteristics of (proper) reply, it follows as a matter of course that the replies that are destitute of the (characteristics) are faulty replies; and they are explicitly stated in another smṛti.¹

A reply that is ambiguous, that is not to the point (in dispute), that is very concise or very prolix,² that meets only a part of (the allegations in) the plaint, cannot be (proper) reply.

A reply that is upon another title of law (i.e. that sets a cause of action different from the one stated in the plaint), that does not meet all the particulars in the plaint, that is of mysterious (or veiled) import, that is inconsistent, that is intelligible (only) after explanation, and that is opposed to reason (or that is void of substance), does not serve the purpose (sought by a reply).³

*Kātyāyana also (says)

The reply, which is one of confession (or admission) as to a portion of the plaint (i.e. as to one count therein), which is a reply of a special plea as to another portion (of the plaint) and which is a reply of denial as to a different portion (of the plaint) is not a proper reply on account of the blending (of several pleas in one)⁴

The same author states the reason why it (such a reply) is not a proper reply :

In the same litigation the burden of proof (*kṛiyā*) cannot rest on both litigants, nor can both succeed in their object, nor can two methods of proof be resorted to at one (and the same) time.⁵

The meaning of this passage is as follows —

In a blending (jomder) of the replies of denial and special plea it follows that the burden of proof lies on both the litigating parties (plaintiff) and defendant), as Nārada declares.

In (the reply of) denial, the proof rests upon the plaintiff, in (the reply of) special plea on the defendant.

1 This is ascribed to Smṛiti by Aparārka, to Bṛhaspati by Par. M. and to Kātyāyana and Bṛhaspati by Vir.

2 The two verses are ascribed to Kātyāyana in Aparārka, Vy. Māt. and Sm. C.

3 These words may also mean 'that admits either much less or much more than what is alleged in the plaint.'

4 For detailed explanation of these verses vide notes to V. M. pp. 28-29, and Kātyāyana vv. 173-175.

5 Mādhik. omits the translation of 'Sukarāt'.

6 'Kṛiyā' means 'means of proof' and also 'burden of proof'. For illustrations and detailed explanation of this and the preceding verse, vide notes to V. M. pp. 29-31 and Kāt. vv. 182-190.

* P. 16 (text)

n. To have burden of proof on both the parties (to a litigation) in the same suit is contradictory (or inconsistent) So also in a combination of (the replies of) special plea and former judgment the defendant alone has to discharge a double burden of proof since Vyāsa says

In putting forward a reply of former judgment and of special plea it is the defendant who should exhibit the proof

And here on account of a text of Vyāsa himself in a plea of former judgment by the decree and by the (testimony of) *prādvivāka* and the like (defendant has to establish his case) in the plea of former judgment the case is to be established by (production of) the decree or by (the testimony of) those who took part in the former judgment while in a reply of special plea, (the case is to be established) by means of witnesses, documents and the like. And so in this (combination of two replies) there is conflict. The same is to be understood in the combination of three or four replies. These (combinations of several replies in the same suit) constitute improper replies only when they are (pursued) simultaneously but when (pursued) one after another they are proper replies. The order (in which they are to be pursued) rests on the will of the plaintiff & the defendant and the *sabhyas*. And Hārta also says ¹

If in the same litigation there be (a combination of) both viz a reply of denial and of special plea or there be (a reply of) admission along with any one of the other (three kinds of reply) then in such a case, what reply should be taken up (first for investigation)? (The answer is) in such a case that reply which is concerned with more valuable or important matters (alleged in the plaint) or whereby the result due to the adducing of proof will follow (quickly or easily) should be regarded as the reply and it becomes free from the fault of confusion (of replies) but otherwise ² (the reply would be liable to the fault of confusion)

¹ The words it becomes liable to the fault of confusion are to be understood (in the above passage) The meaning of this (passage) is when there is a claim for gold and clothes in the case (of a reply) that gold was not received and that clothes were received but returned the judicial proceeding should first be carried on in regard to gold and then with regard to clothes ³. The same (rule) should be applied in regard to the combination of the reply of denial and of former judgment and of the reply of special plea and former judgment. In the same claim (for gold and clothes) if it be replied that

1 The following verses lay down the order in which in certain cases, and presently of the will of the parties several issues raised by the defendant are to be taken up for investigation. These rules are attributed to Vyāsa by Aparakṣa and Vyāsa himself of which add a half verse. In the case of the combination of the replies of denial and special plea, the latter should be taken up first

2 This means if the rule contained in the preceding were not followed

3 As gold is the more valuable out of the two.

P 17 (text)

gold was taken but that clothes were not taken or were returned (after being received) or that (the plaintiff) was defeated (in a lawcourt) in regard to clothes, then the judicial proceeding should be carried on with reference to clothes only and not with reference to gold, since though (gold) is more valuable, there is no necessity of proof in regard to it. Where the claim being ' this is my cow, she was missing on a certain day, she is seen to-day in this person's (the defendant's) house ' and the reply being ' this is false, the cow was in my house even before the time indicated in the plaint ', the reply though a combination of the replies of denial and special plea is not a faulty reply, since it meets the whole plaint (all the points in the plaint). This is a reply of denial together with a special plea. Here the burden of proof rests on the defendant alone, not on the plaintiff also,¹ since Hārta says ' in a reply of denial and special plea, the reply of special plea must be taken up (for investigation) '. In the same way when there is a combination of the replies of denial and former judgment and of the replies of special plea and former judgment, they are not faulty replies, if such combinations meet the whole plaint. Here in both cases the burden of proof lies on the defendant alone. Hence in no judicial proceeding whatever does the burden of proof lie on both the parties (at the same time). This will suffice (to explain the above passage of Kātyāyana)²

After the reply has been recorded, the proofs are to be exhibited and Yājñavalkya (II 7-8) declares the order (in adducing proof)

Then the plaintiff should at once cause to be written the evidence (which he proposes to adduce) for establishing the matter alleged (in the plaint). If that (evidence) holds good he obtains success, if it be otherwise (i.e. if it does not hold good), the reverse is the case (i.e. he is defeated). *This (verse) applies as regards a reply of denial, but in other kinds of replies it is the defendant only who has to adduce evidence, as Hārta says

In a reply of former judgment and of special plea the defendant should exhibit the proof, but in a reply of denial, the plaintiff (should exhibit it); in the reply of admission, there is no need for it (for proof). Yājñavalkya (II 8) thus declares that a judicial proceeding has four parts (stages).

This judicial procedure is shown (by me) to have four parts (stages) in litigations

And the four parts (of *Vyavahāra*) are clearly set forth in another smṛti:

(*Vyavahāra*) is said to be fourfold as in it enter four parts on account of there being the plaint, the reply, the proof and the decision that come in order one after another.

1 The burden of proof in a pure reply of denial is on the plaintiff and in a pure reply of special plea on the defendant. As this is a reply of denial and special plea it may be argued that the *onus* of proof is on both. To this a reply is given here

2 For detailed explanation vide notes to V. M. pp. 32—35,

*P 18 (text).

But this (*dictum*) applies to all replies other than a reply of admission, since a reply of admission has only two parts, as Bṛhaspati says¹

In a reply of denial *Vyavahāra* has four parts and also in (a reply of) special plea, but in replies of admission it has two parts (only)

Yājñavalkya (II 9-10) says

(A defendant) should not countercharge (or counter-claim against) the plaintiff (or complainant) until he has met the claim (made against him) One who is already labouring under a claim (should not be allowed to be charged) by another (until he is free from that litigation) (The plaintiff) should not change what he has already stated² In quarrels (violence of speech and act) a defamation and assault) and in offences in which force enters a counter charge is allowable (even before clearing oneself from the original charge or claim)

*Nārada (p 29 v 24) says

That man who abandoning his former ground of claim has recourse to another shall be regarded as a losing party since he wanders from one ground of controversy to another

The person who shifts his pleading is liable to fine but he does not lose the suit he has brought. This is the meaning This (rule) should be understood as applying to civil proceedings³ as the same author (Nārada p 29 v 25) says

In all civil disputes (a litigant) does not lose (altogether) for verbal deceit (i.e. for changing his statements) In disputes about (seducing) another's wife about land and non-payment of a debt (the party though liable to be punished (for fraudulent speech) does not lose his property)⁴

1 When there is an admission of plaintiff's claim there is no necessity to adduce proof and so there is no *litigium* and the moment there is an admission there is nothing to be established by examination of evidence, but judgment follows at once. Hence there is no *sādhyaśiddhi*.

2 These words may apply not only to the change of pleading by plaintiff but also to the change of pleading by defendant The *Śiṭa* takes it to apply to the plaintiff's change of pleading, while Par 31 applies it to both plaintiff and defendant. Vide notes to V 31 p. 83. The words 'what was alleged' should be written down in the presence of the defendant refer to the things about which allegations were made (i.e. if the plaintiff first complained about theft of rupees, he cannot write down theft of clothes) while here the plaintiff is forbidden to change the title i.e. if he alleged that one hundred rupees were borrowed at interest, he cannot allege that they were stolen from him by the defendant.

3 The eighteen titles of law are classified as either *dhanamāla* or *himsāmāla* (arising out of property or injury i.e. civil or criminal) Vide notes to V 31 p.

4 The printed Nārada reads *ṣaṣṭristvā* — meaning in disputes about cattle women. This verb means that in civil disputes a man does not lose his case altogether by a change of pleading, though he may be fined, but in criminal matters his complaint may be dismissed altogether if he shifts his position.

The latter half (of the verse) serves as an illustration of the first half Yājñavalkya (II 17) says:

When there are witnesses in support of both sides (i e both the plaintiff and the defendant) the witnesses for the plaintiff (are the means of proof); when the plaintiff's allegation is brought down (from its position of having to be proved), then (the witnesses) of the defendant (are to be heard first)¹

'Pūrvavādinah' means 'of the plaintiff'; 'pūrvapakṣa' means 'the plaintiff', 'adhai-bhāte' means 'not requiring to be established because the defendant admits (the allegations of fact in the plaintiff) by putting forward a reply of a special plea' The mention of witnesses is intended to include (by implication) other means of proof also The same author (Yāj II 10) says

A surety should be taken from both (plaintiff and defendant) who would be able to satisfy the final decision ²

The word 'kāṣṭhāminaya' means 'the result of (or carrying out) the judgment' Kāṭyāyana enumerates those who cannot be accepted as sureties

Neither the master, nor an enemy (of the litigant), nor one authorised (or employed) by the master, nor one who is under restraint (or in jail), nor one who is sentenced to pay a fine, never one who is in danger (of life i e seriously ill), nor a coparcener (or heir), nor one who is penniless, nor one who is banished to another country, nor one appointed to state service nor those who have entered the fourth order (i e ascetics), nor one unable to pay (the claim of) the (judgment) creditor and an equal amount of fine to the king, nor one entirely unknown, should be accepted for the purpose of a surety

'Niruddhah' means 'one who is bound by chains and the like'; 'ś'ams'āyasthah' means 'one in a difficulty', 'rakṣhā' means 'one who is entitled to inherit the property such as a son, grandson and the like', 'rakṣah' means 'poor', 'anyatra vāsitaḥ' means 'banished from the country' Yājñavalkya (II 52) says

1. This verse is interpreted in two ways The Mit explains — When there are witnesses on both sides, those witnesses, who support the party that says that he was the first to enjoy the subject-matter of dispute are to be first examined When the plaintiff's allegations have become weak or of little importance (owing to defendant's having admitted the prior state of things but having put forward a subsequent ground in avoidance of the prior state of things), the witnesses of the defendant should be examined first. The interpretation of Aparārka, the Vyavahāramātṛkā and Nilakantha is — in a reply of denial it is for the plaintiff (the man who comes to the court first) to cite witnesses (or other evidence) for proving his case, but in the case of reply of special plea or former judgment, it is for the defendant to adduce his evidence first The difference turns on the meaning attached to the word 'pūrvavādinah' Vide notes to V M pp 40-41 for detailed explanation

2 i e who would be able to pay up the decretal amount and the fine to be paid to the king

* P 20 (text),

The relation of suretyship of creditor and debtor and of being a witness is not allowed by the smṛtis among brothers between husband and wife¹ and between father and son so long as they are undivided Kātyāyana declares (the consequences) if there be no surety

If there is no surety for a party who is able to meet the judgment (i.e. pay the decretal amount and fine) then he (that party) should be kept under guard and at the end of the day he should pay the wages of the servant (who guarded him)

The same author says

A person of the regenerate classes unable to furnish a surety should be guarded by those (servants of the king) who are outside (the court), but (the king) should put in chains eḍras and the like who cannot furnish a surety

Nārada (p 29 v 24) describes the characteristics of a losing party

That man who abandoning his former statement (or ground of claim), has recourse to another should be regarded as a losing party on account of his wandering from one plea (to another)²

*Yājñavalkya (2 18 15) describes a person who (whose testimony) is vitiated (and is therefore unacceptable in court)

He, who moves from one position to another (i.e. who is restless when giving evidence) who licks his lips, whose forehead perspires whose face changes colour who utters his words with stammer and with a dry tongue who speaks much and incoherently who does not heed the speech or eyes (i.e. who does not reply straight to the judge's question nor fix his eye on the judge) who contorts his lips who exhibits change from his ordinary (natural) state in mind, speech and bodily actions, he is declared to be a vitiated person as regards a complaint or being a witness

*Śṛṅgī means the corners of the lips

Now (begins) the exposition of the means of proof

Yājñavalkya (II 22) says

Documents possession and witnesses are declared to be means of proof In the absence of (even) one of these one of the super-natural (modes of proof) is prescribed

Kātyāyana also (says)

If one (litigant) puts forward human means of proof and the other (his opponent) relies on divine (means of proof) the king should in such

1 Vide notes to V M. p 42 as to separation between husband and wife Āpastamba (Dh. S II. 6. 14 16) declares that there can be no division between husband and wife, but the Mit. explains that the words apply to religious rites and not to wealth.

2. Vide p. 18 above for the same verse

P 21 (text)

a case accept (rely upon) the human evidence and not upon the divine (test) If human proof is offered by litigating persons, though it meets only a (substantial) portion (of the whole claim in the plaint), it should be accepted (relied upon) and not supernatural proof, though the latter may be complete (i.e. may completely cover the whole claim in the plaint) In disputes, when witnesses are available, supernatural proof is not allowed and when there is a document,¹ no ordeal nor witnesses (should be relied upon) As to the peculiar conventions of *pūgas* (communities), *s'renis* (guilds of traders) or *ganās* (tribes), writing is the (proper) means of proof and not ordeals nor witnesses ² Where a thing is promised to be given but not del¹vered, where a thing is (given and then) taken back, in the matter of determining the owner (of a thing), in the matter of taking back a thing after it is sold, when one after purchasing a thing does not desire to pay the price, in gambling and betting (on animals) when a dispute arises, (in one of these cases) witnesses are declared to be the means of proof and not ordeals nor documents In (disputes about) the making and use of doors and ways and about water-courses and the like, possession alone is weighty, neither writing nor witnesses

Brhaspati (p 315 vv 1-2) declares the superiority of supernatural proof in certain cases

One who fabricates (or counterfeits) jewels, pearls and coins, who misappropriates a deposit entrusted to him, one who injures another, one who has intercourse with another's wife, these should always be tried with oaths³ In charges of deadly sins, if a party resorts to ordeals when witnesses are available, (the king) should not examine witnesses

Vyāsa (says) .

(If a person says) ' I did not pass this document, it was falsely made (forged) by him (by the opponent), ' disregarding that document, the decision as to that matter should be by means of ordeal, (where a wrong takes place) in a forest or in a lonely place, at night, inside the house, in cases of *sāhasa* and when a deposit is denied a divine mode of proof is allowable⁴

Brhaspati (p 317 v 17) says

1. Compare sec 91 of the Evidence Act

2. The first two here fall under Dattāpradānikavyavahārapada, the next may also mean ' when there has to be a decision between the master and the herdsman ', the next comes under krayavikrayānus'aya The verse ' dattādatte &c ' as quoted in the *nibandhas* presents a bewildering variety of readings The verse about the making and use of doors is referred to in *Lallubhas* v *Bar Amrit* I L R 2 Bom 299 at p 315

3 Both oaths and ordeals are supernatural (*dava*) means of proof, the former being employed in less serious wrongs Vide notes to V M p 45 for explanation,

4. This last verse is Nārada (*rnādana* 241),

* P 22 (text) § P 23 (text)

of two kinds, viz royal and *jānapada* (popular, of the common people)
Brhaspati (pp 304-5 vv 4-11) says

Popular writings are sevenfold, viz partition (deed), gift-deed, purchase, mortgage deed, (deed of) conventions, deed of service (or bondage), a deed of debt and the like. Royal writings are of three kinds. Where brothers, divided among themselves according to their wishes, make a document of separation, that is called a partition deed. That writing which, on making a gift of land, a person executes and which is (intended) to last as long as the sun and the moon endure and that is not to be cut down (as to the extent of the gift) nor to be resumed, ¹ is known to be a deed of gift. When a person, having bought a house, a field and the like, causes a writing to be made containing words that state the exact price (paid or agreed), that is called a deed of purchase. That is called a deed of mortgage (or pledge) when a person gives movable or immovable property as a pledge and makes a writing which requires (the pledge) to be either preserved (intact without enjoyment) or to be enjoyed ². When (the people of) a village or a country execute a document in furtherance of *dharma* (i e laying down some rule or convention of conduct), on which there is common agreement, which is not opposed to the (interest or orders of the) king, that is said to be a deed of conventions. That document, which a person, destitute of food and clothes in a forest, makes stating 'I shall do your work (or the tasks you will appoint),' is called a bond of service (or serfdom). That document of future repayment (*uddhāra*) which a man, having borrowed money at interest, executes himself or causes to be written (by another) is termed by the wise a bond of debt.

On account of the word *ādi* (in the first verse above) documents of purification and the like are also included (in the enumeration of kinds of writings). Kātyāyana describes a deed of purification and the like.

When a person has performed the (prescribed) penance and become free from the accusation (of having committed a forbidden act) the deed attested by witnesses given to him is known as a deed of purification. That writing is known as a deed of peace which recites what happened (by way of compromise or settlement) when an accusation is brought (against a person) before all the leading people ³. When a boundary dispute is decided, the writing (made) is ordained to be a deed of (settlement of) boundaries.

1 Vide notes to V M p 48 for the terms used here

2 A pledge is either of moveables or of immovables, in either case the creditor may be either entitled to use it or he may be required not to use it but only to preserve it with him

3. This verse is somewhat obscure. It probably refers to the settlement made by the leading people of the place in case of an accusation made before them.

* P. 25 (text)

*Prājāpati describes a submortgage

If the creditor hypothecates to another the thing already pledged with him for the same amount (for which it was pledged with him) he should pass a (fresh) deed of mortgage (or pledge) and should hand over the prior (deed of mortgage or pledge) to him (to his own creditor)

Yājñavalkya (II 94) also (says)

When (a debtor) has paid off the debt he should have the deed (of debt) torn off or he should cause a new writing to be passed (by the creditor if the original be lost or inaccessible at the time) for the purpose of (being able to establish) his freedom from the debt

Nārada (p 75 v 186) mentions the difference between writings in one's own hand and in another's hand referred to already

Writings are of two kinds, viz those made in one's own hand and those made in another's hand and not having attestation and having attestation (respectively). Their validity depends upon the usages of the country (where they are made).¹

Yājñavalkya (II 89) says

A writing in one's own hand though without witnesses is declared by the *smṛitis* to be (legal) evidence provided it is not due to force or fraud. *Balam* means force, *upadhikṣ* means greed and the like.²

The same author (Yāj II 84-85) declares a special characteristic of documents made in another's hand

Whatever transaction is settled mutually according to their wishes should be consigned to writing attested by witnesses and having at the head the name of the creditor and should be marked with the year the month the fortnight the day the names, castes and gotras (of the creditor and the debtor) titles due to Vedic affiliations their own names and the names of their fathers and the like

Sabrahmacārīka means a secondary name due to the (study of) the *Bahvṛca* and other *śākhās* (of the Veda) such as *Bahvṛca* (a student of the Rgveda) *Kāṣṭhā* (a student of the Kāṣṭhaka Śākhā of the Yajurveda).³ The same author (Yāj II 86-88) says

1. What is written in one's own hand need not be attested by witnesses, while what is written in another's hand requires attestation. This verse is quoted in *Lakṣaḥai v. Ganak* I. L. R. 8 Bom. 7 where it was held that the court was not bound to apply strictly this rule to Hindu wills, since wills were not recognized by ancient Hindu law and a will written by another man and signed by the testator was held to be valid though it was not attested.

2. The primary meaning of *upadhī* is a trick or deceit and not greed as *Nīlakaṇṭha* says.

3. Compare the Maṇḍanā copperplate inscription of Harṣa (Epigraphia Indica vol VII p. 155) where the donors are described as *chandoga-sabrahmacārī* and *bahvṛca-sabrahmacārī*

When the transaction (agreed upon) is completed (i.e. it is written out), the debtor should place below it his name in his own hand (adding ' what is caused to be written above in this (deed) is assented to by me, the son of such a one, ' witnesses should write down in their own hand (their own names) preceded by their father's name ' in this matter I, so and so, am a witness. These witnesses should be even (in number) Then the scribe should write at the end (of the document) ' this is written by me, so and so, son of such and such, at the request of both parties '

' *Samāh* ' means ' equal ' in number and qualifications (with the parties). In some (digests) there is coalescence of the letter ' a ' (after ' to ') and (so they read) ' *asamāh* ' (meaning ' uneven in number ') Nāṇada (says)

If a debtor does not know the alphabet (i.e. is illiterate), he should cause his assent to be written (by another); if a witness (be illiterate) he should cause (his attestation) to be written by another witness in the presence of all the witnesses

It was stated (by Brhaspati) that royal writing is of three kinds; Yājñavalkya (I 318-320) and Brhaspati exhibit (the peculiarities of) it .

Having made a gift of land or a corrody the king should execute a writing (about the gift) for the information of future good kings. On a piece of cloth or a copperplate marked at the top with his seal, the king, having written down the names of his ancestors and of himself, the measurements of the thing gifted, a description of the boundaries of the thing donated,¹ should issue a permanent edict bearing the date and his own signature

Nibandha means ' what is granted by a king and the like to be obtained at fixed times from mines and the like, ' *pratigraha* means ' that which is received as a gift such as land and the like; ' *parimāṇm* means ' its extent ' ; *dānam* means ' what is gifted such as a house; ' *chheda* means ' its limits; ' *upavarṇam* means ' their mention ' So also (Brhaspati pp 306-307 vv18-19)

When a king pleased with the services, valour and the like, of a person, grants a district and the like to him by a writing, it is called a *prasāda-lakkhita* (a writing of favour) When a king, after a decision on hearing the plaint, the reply and the evidence adduced, gives a writing to the successful party, that is called a *jayapatra* (a writing of success, a decree)

1. ' *Dāna . varṇanam* ' may also mean ' setting out the smṛti passages condemning the resumption of gifts made by former kings ' This is a preferable explanation and is supported by the verses occurring in almost all grants condemning the resumption of gifts. These verses and the following passage of the Mayūkha up to *jayapatra* are quoted in *The collector of Thanā v Harī* I. L. R. 6 Bom. 546 (F B) at pp 557-558

2 The definition of *nibandha* is quoted in *Ghelaḥḥ v Hargovan* I. L. R. 86 Bom. 94 at p 101 as showing that it is not the king alone who can make a grant of a *nibandha*.

*P 28 (text).

Vyāsa speaks of the substitute of the king (in issuing royal edicts)

The minister for peace and war when ordered by the king himself may write down the royal edict on copperplate or on cloth
The same author says that the king should write down his assent in such a case

(The minister should write down) the boundaries and measurements and the king should write with his own hand this has the assent of me the king, so and so and the son of such and such.

Sannivesam pramāṇam ca -these words are to be connected with the preceding text Vāseṭha mentions four kinds of royal writings

A sāsana (edict) should be known as the first another is jayapātra (then there are) Eṣāpātra and prajāpātra, royal writing is (thus) four fold ¹ That by which feudatory chiefs officers and governors of provinces are commanded (by the king) to carry out some business is called an *ajñāpātra* (document of command) That letter by which some business is communicated to a sacrificial priest the family priest a preceptor and other revered and worthy persons is called a writing of request.

Sāsana and jayapātra have been explained above Yājñavalkya (II 91) says

When (a document) is in another country when the letters (or words) of it have become doubtful (or difficult to make out) when it is lost or its ink has been rubbed off when it is stolen torn into pieces, burnt cut asunder (the king) should cause another writing to be made

Nārada (pp 77 78 v 142) says

When a document is placed in another country when it is shattered into pieces when its letters have become effaced when it is stolen, then time should be granted (for its production) in cases where it exists and if it does not exist the decision must rest on the (evidence of) the witnesses , who saw it executed)

Draṣṭṛaḥ means witnesses in the absence of witnesses supernatural proof (should be resorted to) as Kātyāyana says

In a judicial proceeding where there is no writing nor witnesses (the king or judge) should prescribe supernatural proof (ordeals etc)

Yājñavalkya (II 93) says :

The genuineness of a document about which there is a doubt (or dispute) may be established by (comparison with other) documents that are (admittedly) in the hand of the person (who is alleged to have

1. Vide notes to V M. pp 53-54 for the quotations from Kauṣīlya about Eṣāpātra and prajāpātra
p 92 (text)

written the document in dispute)¹ and by presumption, by the (possibility or otherwise of) the meeting together (of the parties), by proof, by marks (such as seals), by the (subsequent) relations (of the parties), by the (probability of the origin of) title, and inference²

Yuktih means 'presumption from circumstances'; *prāptih* means 'staying together of the two parties (to a document) in the same place'; *ciknam* means 'the impression of a seal and the like', *kriyā* means 'witnesses and the like' (other means of proof), *sambandhah* means 'relation in future' (i.e. after the alleged date of the document), *āgamah* means 'some probable mode of acquisition' (of the document),³ *hetuh* means 'inference'

Prajāpati says

"The decision about (the genuineness of) a royal writing (grant) should be made with great effort by means of the examination of the king's own signature (thereon), of the seal and of the handwriting of the scribe (of the grant)

Bṛhaspati (p 307 vv 23-24) declares what are vitiated documents

A document executed by a dying man, by an enemy, by one in fear, by one distressed, by a woman, by one intoxicated,⁴ by one who is overwhelmed in some calamity, and executed at night by fraud or force does not become valid. Where even a single witness who (whose signature) is placed on a deed is vitiated (on account of the above mentioned causes) and who is censured or where the writer of a deed is of that sort, that deed is declared to be a false document

Here ends the section on writing

Now (begins) Possession⁵

Nārada (p 62 v 85) says

Possession acquires validity (as evidence) when accompanied by a clear title. Possession with a clouded title does not amount to proof (is not accepted as a means of proof)

1 Compare section 73 of the Indian Evidence Act

2 For detailed explanation of the words *yukti*, *prāpti*, *sambandha*, *āgama*, *hetu*, vide notes to V M pp 54--55. The Mit and the Mayūkhya widely differ in the interpretation of these terms

3 This means that it should be seen whether the document is produced from proper custody

4 In *Narbadabar v Mahadeo* I L R 5, Bom 99 at p 104 it is suggested that 'stri-matta' should be taken as one clause meaning 'under female or aphrodisiac influence', but this is not correct, as Kāt v 271 separately mentions 'stri' and 'matta'

5 In *Lalubhar v Dar Amrit* I L R 2 Bom 279 at pp 314--316 the whole of the section on possession is critically examined and differences between the two views of Viṣṇanes'vara and Nīlakantha are pointed out

* P. 30 (text)

Vyāsa declares that possession (in order to be valid evidence) must be characterised by other attributes just as it must be accompanied by title :

It is desirable that possession (in order to be valid) must have five attributes (lit parts) viz it must have title behind it it must be of long standing unbroken free from protest and in the presence (before the very eye) of the opposite party

Nārada (p 62 v 86) declares that a claim cannot be established by mere possession :

He who pleads enjoyment alone and no title at all should be considered a thief on account of his (merely) putting forward the deceptive plea of possession (which even a thief can put forward)

*This rule (that mere possession without more is of no avail) only applies to such a period of time during which it is possible to preserve the memory of title but the same author (Nārada p 62 v 89) says that mere possession would be valid evidence (with reference to a period of time) of which it is not possible to preserve memory

In cases falling within the memory of man it is desirable that possession must be accompanied with title in order to be recognised as valid proof of ownership of land. In cases beyond the memory of man possession continued successively for three generations (is valid proof of ownership over land) on account of the absence of certainty (that there is no title)¹

Anugamābhārad means as the conclusion that there is no title cannot be drawn by means of (the proof, called) non-apprehension (*anupalabdhi*) of what is fit (to be apprehended)² Even in the case of possession beyond the memory of man if there is continuance (or persistence) of memory as to the absence of title (in the person or persons who had possession) the same author (Nārada p. 62 v 87) says

That sinful man however who enjoys (has possession) without title even though for several hundred years should be punished by the king with the fine prescribed for a thief

1 Vide pp. 58-59 of the notes to V. M. for detailed explanation of this verse and of *smṛti* *ālā*. According to the *Mit. smṛti* *kāla* (period of human memory) is said to be one hundred years according to the *Śmṛticandrikā* and *Śādhava* it is a period of 105 years. Three generations would come to about 100 years. According to some *smṛti* it is a period of sixty years and also three generations. *Śāndilī*'s translation (p 21 ll 14-17) is loose and does not bring out the technical sense of *anupalabdhi*

2. For detailed explanation of *anugamābhārad* and *anupalabdhi* vide note to V. M. pp 59-60. *Anupalabdhi* is the fact of six *pramāṇas* according to the *Mīmāṃsāśāstra*, apart from *pratyakṣa* and inference. In such cases as in this place there is no *pramāṇa* to apprehend the non-existence of the *pramāṇa* by this means of *anupalabdhi*.

As to what the same author (Nārada p 63. v. 91) says

That which has been enjoyed even unjustly by the father and three ancestors (of a person) cannot be recovered back (from that person) since it has descended successively through three generations,

it is to be interpreted to mean ' what has been enjoyed by three generations (of the present holder) including the father even without title and even unjustly cannot be recovered back (from the present holder), much less can it be recovered back when it is impossible to conclude that there is absence of title ¹

As to the text of Hārta,

What has been enjoyed by three ancestors without any title whatever cannot be recovered (from the present holder) since it has descended through three generations

it is to be explained as ' without a title that can be easily perceived and not as without even the semblance (or appearance) of a title ' As for the text of Yājñavalkya (II 28),

That man, who first acquired a thing, should prove the source of his title when he is proceeded against; his son or son's son need not (prove title), in their case possession has more weight,

it means that only the first acquirer, if he cannot prove his title, is to be fined (for unlawfully usurping possession) and not his son and grandson, but it does not mean that in their case they succeed in their object (viz retaining the thing on the ground of possession) Hārta says to a similar effect

That man however, who first acquires a thing is liable to be fined if he cannot make out a title, and not his son or son's son; but both (the latter) are liable to be deprived (by the court) of the thing possessed like the acquirer himself ²

Yājñavalkya (II 29) says

If a person who has been proceeded against dies, his heir (or representative) must establish title (as much as the deceased) In such a case possession without title would not be a (valid) plea

1 The object of the verse is not to prescribe the impossibility of recovering after three generations what is wrongly seized, but the object of it is to prescribe that possession for more than three generations confers ownership when it is uncertain whether it originated in no title The words ' for three generations ' stand for *asmūrtakāla* (time beyond human memory)

2 The idea is that the original acquirer is liable to fine if he cannot prove his title His son and grandson, if they cannot prove title, are not liable to be fined, but if they cannot prove title in their ancestor and in themselves, they are liable to lose the thing they enjoy, since their possession has not ripened into ownership by enjoyment for three generations

* P 82 (text)

Rikāṭi means a son and the like who partakes of the heritage, *ṭam*¹ means *ṭgamam* (title) (An objector says) it is inconsistent (or absurd) to say that possession for a long time is proof (of ownership) for it is seen (in the texts) that a claimant loses (his right to a thing) even after possession (by another) for a short time as is observed by the same author (Yāj II. 24)

A person loses land in twenty years when it is enjoyed by another for that period before his eyes and without protest (from him) and chattels in ten years²

*The reply (to the above objection) is this (verse of Yāj) is to be construed as laying down that the man loses the profits arising from the land and the like for that period (i.e. 20 or 10 years) when he sees (another enjoy his land or chattels) and yet does not protest (or cause interruption) and not as laying down that he loses also the thing itself viz the land and the like (after 20 or 10 years) since (the latter proposition) would be opposed to the text already cited he however who enjoys without title &c (Nārada p 62 v 87) *Ētīyāna* says

The wrongful possessor of cattle women or males (slaves) or his son should not rely upon (mere) possession (as his support or strong point in case of dispute), this is the rule of law ordained (by the sages) Nārada (p 61 v 81) says

A pledge (or mortgage) boundaries a minor's wealth, an open deposit a sealed deposit women (female slaves) the property of the king (or state) and of a Brāhmana learned in the Vedas these are not lost (to the owner) by the (long) possession (of another)³

Manu (8. 146) says

A milch cow a camel, a riding horse an animal that is handed over for being broken (or trained), these (and other things) used through the friendship (or assent of the owner) are never lost (to their owner through long possession of another)

Damyah prayujyate means which is delivered for being broken

Here ends the section on possession

1 This verse has been variously interpreted from comparatively ancient times. *Madhātithi* on Manu (8. 142) gives three interpretations. *Vitakṣipha* follows the *Mit.* The plain meaning of the verse is in conflict with the proposition that possession for hundred years is required to create ownership. Therefore the words "ownership" are interpreted to mean loss of the profits of the land and not loss of the land itself. It is almost certain that at different times and by different means different periods of adverse possession were laid down, and the tendency seems to be to bring down the period for adverse possession. *Vit.* notes to Y. M. pp. 62-64 for further details.

2 This is almost the same as Manu. 8. 142.
p 23 (text)

Now (begins the chapter about) witnesses

In Todarūmāda¹ Nārada says (p 79 v 147)

In doubtful matters when two litigants are disputing, a clear perception (knowledge or conclusion) results from witnesses, since the latter have either seen, heard or experienced the matter in dispute.²

³ Brhaspati (p 299 vv 1-2) enumerates the kinds of witnesses

Witnesses are declared (in the smritis) to be of twelve sorts, viz a subscribing witness, one whose name is caused to be written (by another), concealed witness, one who has been reminded, a member of the family, a messenger, one coming by chance (not called on purpose), an indirect witness, one who is confided in by both sides, the king, the (presiding) judge, the people of the village

*likhitah*³ is one who (whose name) is placed on the document by the plaintiff, *lekhita* is one who (whose name) is placed (on a deed as a witness) by the defendant at the instance of the plaintiff, *gūḍha* is one who is made to hear (the transaction between the parties) behind a wall or the like, *smārita* is one who is reminded again and again of the transaction; *yādrecchika* is one who having arrived by chance (at the time of the transaction) was made a witness, *uttara* is one who can depose (to a transaction) over and above the (actual) witnesses because he hears (from them what they had seen) or is made to hear (what the real witnesses themselves heard), ⁴ *adhyakṣa* means the presiding judge, and this word is intended to include the *sabhyas* (assessors) and others by reason of the text of Kūṭyāyana 'the scribe, the judge and the sabhyas in succession (the later one in the absence of the earlier) are (witnesses)'⁵ The same author (vide Brhaspati p 301 vv 16-18) says

There should be nine, seven, five, four, or only three (witnesses) Two may be accepted as (sufficient) witnesses, if both be *śrotriya*s (learned in the Vedas); (but) a single witness should never be asked (examined) Of *likhita* (subscribing) and *gūḍha* (concealed) witnesses, two (each) may be accepted (as sufficient to decide a cause) and of *lekhita* or *yādrecchika* (chance), *smārita*, *kulya* (those of the same family) and

1. This is an encyclopædia on religious and civil law, astronomy and medicine compiled by Todaramalla, the finance minister of Akbar.

2 The latter clause may also mean 'since they have a direct cognition of the matter by sight or hearing'

3 For detailed explanations of these terms vide notes to V M. pp. 65-67

4. Mandlik (p. 23) translates *uttara* as ('one in answer) speaking after witnesses, upon hearing or being told (their evidence)' This is far from clear.

5. The other half of this verse as quoted in the Mit means 'and the king when he himself tries the cause are declared to be witnesses'.

* P 34 (text)

of *utāra* witnesses there must be three, four or five. A single witness alone would be enough for proof if he be a *dūtaka* (a messenger) an accountant one employed in the business (by both parties as their intermediary) the king or the presiding judge.

Yājñavalkya (II 72) declares that even one witness of the *śukṣita* and other sorts may be accepted (as sufficient for proof) if both sides consent.

With the consent of both parties even a single person who knows the *dharma* becomes (sufficient as) a witness.

‘ Vyāsa says

Even one witness whose actions are pure who knows the *dharma* whose word is known from experience (to be true) is enough for proof (of a thing) especially in *śāhasa* (offences attended with force such as murder robbery rape, &c)

Anubhūtaśak means one whose word is generally seen to be true. Kātyāyana says that one witness, even though not reputed to be a veracious person is sufficient in cases of deposit and the like.

Even a single person may depose as a witness in the case of a deposit made secretly (in his presence), as regards things borrowed for use even a single person sent by the plaintiff (i.e. the owner of the thing to the borrower with the thing) may be (enough) as a witness.

Ādānam means ornaments and the like such as ear-rings brought (from the owner thereof) on the occasion of a marriage or the like. The same author (Kātyāyana) declares even one person sufficient as a witness in disputes about articles for sale.

That man by whom an article for sale was made (finished or manufactured) should identify it. In a dispute (about that article) he though alone (as a witness) is declared to be (sufficient) proof.

And Vyāsa declares the qualifications of them (of witnesses)

Those who know the *dharma* persons having sons, persons born in distinguished¹ families those who are well-bred those who (generally) speak the truth, those who perform the rites prescribed in the Vedas and the *śrautis*, persons free from hatred and envy those who are *śrotriyas* (learned in the Vedas) persons who do not depend upon others who are learned who do not travel from place to place and those who are in the prime of life should be made witnesses by the wise in disputes about debts and the like.

1 The word *manuṣā* is rendered thus by the Kaipāśa and the Vi. mīttādaya. Vāsanārāma explains those who know the preceding circumstances of the transaction in dispute. Medhātithi (on Manu 8, 62) explains *manuṣā* also as those who are resident of the same place as the parties.

* Nārada (p 81 v 155) says

(In disputes) among *s'renis* (guilds) the office-bearers (or heads) of the *s'renis*, among groups or associations¹ the heads thereof, among those who stay outside (the village, i.e. who are untouchables) persons who live outside, and (in disputes) among women, women become (proper) witnesses

Kātyāyana speaks of members of associations (*vargas*)

Persons wearing marks peculiar to their sects (such as Bauddhas), *s'renis* (guilds), *pūgas* and other communities of merchants and all others who are banded into a group (or association) these are called *vargas* by Bhṛgu. The leaders (or heads) of *dāsas* (serfs), *cāranas* (bards), wrestlers, of those who subsist (by driving or riding) elephants, horses and chariots and of groups of every sort are known (in the *smṛtis*) to be *vargins*

Yājñavalkya (II 69) speaks of persons of other castes (as eligible witnesses):

It should be known that witnesses (in a cause) ought to be at least three; they should be devoted to performing the rites prescribed in the Vedas and *smṛtis*, (they should be) of the same caste and the same *varna* (class) as that of the litigants or men of all castes may be allowed (as witnesses) for all castes.

The same author (Yaj II 70-71) mentions those who are to be excluded (as witnesses)

A woman, a minor (under 16 years), an old man (above 80), a gambler, one intoxicated, one possessed, a person reputed to be guilty of a deadly sin, an actor, an unbeliever (or heretic), a forger (of deeds or coins), a deformed person, one degraded from caste (for some sin or wrong-doing), one interested (in a party to the suit), one interested in the subject matter (of dispute), a friend (or associate), an enemy, a thief, an adventurer (or desperado), one known to be a liar, one deserted and the like are not (competent) witnesses

Nṛdhūtah means ' one abandoned by his kinsmen (or friends) ' ; the word *ādri* (the like) includes slaves and others. Brhaspati (p 302 v 29) says

The mother's father, the father's brother, the wife's brother, the maternal uncle, the brother, a friend and son-in-law these are not (competent) witnesses in all disputes

\$ Nārada (p 83 v 161) says

He, who not being named (cited) as a witness, comes of his own accord and deposes, is termed in the *s'āstras* a volunteer (witness) He does not deserve to be a witness

1. For *s'reni*, vide above p 5 n 1. The word 'varga' means ' a group or association in general ' and is of wider import than *s'reni*. It may apply to any association or group of people banded together for some purpose.

* P 86 (text) § P. 87 (text)

Kātyāyana says ¹

If one of the subscribing witnesses that are cited by a disputant deposes against the others all of them become no witnesses * (i.e. become useless or incompetent)

Nārada (p 89 v 188) declares that even such (persons as are above declared to be incompetent witnesses) are in certain cases allowable as proper witnesses

Those even, who have been mentioned (in verses 178-187 of Nārada's prādāna chapter) as incompetent witnesses such as slaves, impostors and the like become (competent) witnesses, having regard to the gravity of the matter (in dispute)

In the case of the absence (of competent witnesses) Manu (8 70) says

In the absence (of competent witnesses) evidence may be given even by a woman, by a minor by an old man by a pupil or kinsman by a slave or hired servant

Yājñavalkya (II. 72) says

In (charges of) adultery theft assault and slander and in all offences attended with force (such as manslaughter) any person may be a witness.

In this passage, * although adultery and the like fall under the category of *adharma* they are separately mentioned in order to refer to such adultery and other offences as are clandestinely committed Us'anas says

A slave a blind man a deaf person a leper a woman a minor an old man and the like even these are regarded as (competent) witnesses in *adharma* (offences due to force) when they are not concerned (in the matter to be tried)

* *Anabhisambaddhāh* means when they are not partial (to one side)

Bṛhaspati (p 803 v 24) says

A litigant may point out faults in the witnesses cited (by the opponent) to prove the matter in dispute if the faults really exist A litigant attributing faults to witnesses who are faultless is liable to pay a fine equal (to the matter in dispute) ⁴

1. The word *likhitaṇām* and *nirvīṇaṇām* may also mean that are put down as witnesses in the plaint or reply and are cited as witnesses at the time of proof (*śruti*)

2. Vide notes to V II. p 70 for detailed explanation. This rule of Kātyāyana was to apply only where the witnesses that give conflicting testimony were equal in number or equal in merit. Compare Nārada (prādāna 163). Vide notes to KIL v 2-3.

3. Compare a similar remark above p 2.

4. This would apply only where it is possible to set a money value on the matter in dispute. Hence Apastamba and Vir explain it as meaning 'the fine imposed on a false witness' P 83 (text)

In this passage the word *vādī* (litigant) means ' the defendant ' ; *tatsamam* means ' equal to the amount which is the subject of dispute ' Vyāsa says :

The faults of the witnesses should be stated by the defendant before the court They (the witnesses) should be made (by the judge) and the assessors to refute all the faults put down in writing (against them)

The meaning is that the witnesses should be required by the *sabhyas* (assessors) to give their explanation with regard to their faults as witnesses written down on paper The same author (Vyāsa says) .

If (the witnesses)¹ admit (the faults pointed out in them), they do not at all deserve to be witnesses if it be otherwise (i. e. if the faults are not admitted), they (the faults) should be established by the defendant with evidence If the defendant cannot clearly establish (the faults urged by him) against the witnesses he should be made to pay a fine When the witnesses (cited by the plaintiff) are proved (to possess the faults pointed out by the defendant), they are to be rejected, being devoid of the characteristics of (competent) witnesses (The plaintiff) should be made to pay a fine in the same way (as the defendant, when the latter fails to prove the faults alleged) according to the procedure laid down in the *s'āstra*, if the plaintiff, who relies solely on the goodness of his witnesses (in whom faults are established), does not care for other means of proof.

Atonyathā means ' if not admitted, ' *bhāvanīyāh* means ' should be made to admit ' (their faults), *kriyayā* means ' by evidence ' The connection of the words is ' not establishing (the faults) clearly ' (i. e. *sphuṭam* is to be connected with *abhāvayan*) As to the text

Those faults of witnesses that are (obvious) to the members of the court or that follow from the ordinary experience of the world should be considered (by the members of the court of their own accord) Such faults should not be required to be established, since (such witnesses) should be excluded (by the court) on account of their (patent) faults²

1 Mandlik (p 25) translates this as ' in the answer of admission witnesses are never fit to be called ' . This is wrong It has already been stated that in an answer of admission no evidence is necessary. The author is now on the subject of faults of witnesses The explanation of ' atonyathā bhāvanīyāh ' that follows makes it clear that the translation should be as above

2 This verse is ascribed to Vyāsa by Aparāka, Śm C and Vir, while Parāśara-Mādhaviya ascribes it to Kātyāyana Vide notes to V. M pp 72--73 for various readings and detailed explanation. Even with the reading ' sabhāsadām dūṣanam ' it is possible to translate as above, the literal meaning being ' what appears to be a patent fault of the members &c ' The word *doṣavaryanūt* may also mean ' in order that the fault called *anavasthā* may be avoided ' . If witnesses were called to prove defects in witnesses other witnesses might be cited to prove the former set to be false and the process might have to be carried on ad infinitum,

*It has reference to (faults in) trustworthy witnesses that (faults) can be ascertained from ordinary experience of the world. When the defendant has no knowledge of the faults (of the witnesses of the plaintiff) the same author says

Those faults of evidence (witnesses and documents) that are latent should be declared by him who disputes (the evidence) at the (proper) time and the patent faults should be declared by the members of the court (*sabhyas*) at the proper time after exhibiting what the *sāstra* (the works on law) dictates¹

The meaning is that latent (concealed) faults should be exposed by expounding (by reference to or reliance on) the *sāstra* before the (actual) examination of the witnesses. And Bṛhaspati (p 302 v 250) says that they (the latent faults) should not be exposed after that (stage)

Whatever faults in (or objections to) a document or a witness there may be must be declared at the time when the trial is proceeding but the (litigant) should not (be allowed to) declare the faults after they (the witnesses) have deposed

Uktān means when they have said ' ' or when they have begun to speak²

The termination of the past passive participle (*kta* in Panini's terminology) is added (here in *uktān*) in the active sense according to the rule³ the affix *kta* (1 e fa) is added to a root to denote the completion of the first of a series of continuous acts and in the active voice *hātyāyana* declares the punishment in this matter

He who after a matter has been deposed to would find fault with (raise objections to) witnesses in whom he found no fault before and can not give (adequate) reasons for that for not pointing out the faults earlier shall be mulcted in the lowest amercement⁴

If the witnesses be themselves unable to refute the objections raised against them the party (whose witnesses they are) must do it so says Bṛhaspati (p 302 v 26)

1 The proper time for pointing out the faults of witnesses by litigants is when the hearing begins and for the judge and the assessors when the judgment is being pronounced. The *Sūtras* (*smṛtis*) lay down rules as to circumstances that vitiate oral and written testimony

2 Mandlik translates (p 20) *uktān* as ' the speaker beginning to speak () all be stopped; this is the meaning ' This is quite wrong. Note to V M p 74 ' The word *uktān* (which is a past passive participle) would naturally be connected with *dāna* in the preceding ball, but then the sentence hardly makes any sense. Here *uktān* is explained as an active past participle and connected with witnesses

3 This is Pāṇini III. 4. 71. Yāgy notes to V M p 4

4 According to *Mānu* R. 134 the lowest amercement was 500 *paṇas* the highest was 1000 and the highest was 1000.
p 52 (text)

He, whose documents or witnesses are found fault with in a suit, will not succeed in his cause, as long as he has not cleared that (the document or the witness of the faults pointed out).

Tat (in the verse above) signifies 'a document and the rest'. *Kātyāyana* prescribes the punishment for those who adduce false witnesses .

*He, who, through a desire to succeed in his cause, cites false witnesses, should be deprived of all his belongings and should be then made to lose the subject matter (of dispute)¹

Nirvisayam means 'deprived of the property that is the subject matter of dispute' *Nārada* (p. 90 vv. 193-196) declares the means for ascertaining false witnesses

He, who, on account (of the consciousness of) his own wrong-doing (guilt in perjuring himself), appears like one uneasy, shifts from place to place (when giving evidence), runs after every one (he sees), who suddenly coughs much, again and again breathes deeply, who scratches the ground with his feet, who shakes his arms and garment, whose face changes colour and whose forehead perspires, whose lips become dry, who looks above and sideways, who without being asked talks much and irrelevantly as if he were in a hurry, should be known as a false witness (The king) should punish such a sinful one severely'.

Kātyāyana and also *Manu* (S 87, 79-80) state the manner of putting questions to witnesses .

The judge, himself being pure, should ask in the forenoon the witnesses of the regenerate classes who are pure to depose to the truth, with their faces turned to the east or north, in the presence of (an image of) the divinity and *Brāhmanas* . § The judge should in a soothing tone question the witnesses in the court-room and in the presence of the plaintiff and the defendant in the following manner; 'All that you know concerning the reciprocal actions of these two ' (litigants) in this matter depose truthfully, for you are in this matter the witnesses

In disputes about kine, horses and the like the same author (*Kātyāyana*) declares the (necessity of) the presence of the subject-matter of dispute (at the trial);

In the presence of the plaintiff and the defendant and of the subject matter of the suit (the judge) should urge (require) the witnesses to give evidence to their face and never behind their back (Evidence) may in rare cases be taken in the vicinity of the subject-matter (of dispute)

¹ *Tatah* may mean 'on account of that fault' and *nirvisayam* according to the *Smṛticandrikā* means 'banished from the country' ;

* P 40 (text). § P 41 (text).

even in the absence of both (the litigants) This rule holds good in (disputes about) quadrupeds, bipeds and immovable property In all disputes about articles that are weighed (like gold) or that are counted or measured (the judge) may require the witnesses to depose even in the absence (of the subject matter of dispute) but not in other cases

Tayorapi vinda kvacit—this means even in the absence of them both i. e. of the plaintiff and the defendant¹ but in the presence of the subject of dispute in some cases i. e. in the case of quadrupeds and the like, *taulyam* means gold and the like that are capable of being weighed, *ganamam* means coins and the like that can be counted out, *meyam* means rice wheat and the like which can be measured *abhidrepi* means even in the absence of the subject matter of suit, *kryadikrapu* means in judicial proceedings The same authority (Kātyāyana) says that in disputes relating to homicide the deposition of witnesses should be taken in the presence of (an image or temple of) Śiva :

In the case of the killing of living beings, (the judge) should make the witnesses depose in the presence of Śiva when no trace (or remnant) of the death is left, otherwise (i. e. when traces exist) a witness should not be made to depose thus (i. e. in the temple of Śiva)²

**Tu* means the deposition of a witness. It should be taken (in the presence of Śiva) in the absence of any marks of the homicide, *anyathā* (otherwise) means when there are marks of the killing The same author (Kātyāyana) says

The king should not cause procrastination in recording the deposition of witnesses. Great sin, viz failure in performing one's duty results from procrastination

Nārada (p 81 v 189) says

Having summoned the witnesses and having bound them firmly by oaths, (the judge) should separately question all the witnesses whose character (conduct) is well-known and who are familiar with the matter in dispute.

1. Vir explains this as Nīlakaṇṭha does. But the Śmṛitendriḥ and Parīkṣa-mīdhariya explain differently viz. even apart from the two places (evidence may be taken) The two places where witnesses may depose are the court and in the case of immovables near the property itself. Evidence in the case of homicide may be taken at the place of crime.

2. This is a somewhat difficult verse. Some digests read in the presence of the dead body (śara for Śiva). This latter seems to be a better reading. Nīlakaṇṭha's way of taking *śara* as referring to deposition and connecting *abhidrepi* with *śara* is far-fetched. He had to resort to it as he read *śara-samiddha*. Vīda notes to V II, p. 15 for details.

Vasistha says .¹

What was seen by the (witnesses) together should be deposed to by them in the same way (i. e. they should depose simultaneously); but (what was seen) by the witnesses separately should be related by each separately. Where a matter has become known to witnesses at different times (the judge) should make them depose one by one. This is the rule (of examining witnesses) laid down (in the s'āstras).

Manu (8 113, 102) says :

A² *Brāhmaṇa* should be made to swear by (his) truth, a *Kṣatriya* by his riding animal and weapons, a *Vaiśya* by his kine, grain and gold, a *S'ūdra* by (invoking on his head) all the sins (in case he deposed falsely). *Brāhmaṇas* who tend herds of kine, who are traders, mechanics or actors, who are hired servants or money lenders, should be treated as *S'ūdras* (for purposes of examination as witnesses). Those³ who are fallen from their proper duties, who subsist upon food given by others and yet who desire the status of a man of the regenerate classes should be treated like *S'ūdras*.

*The meaning (of *satyena*) is if you speak falsely, thy (merit due to) truth will perish; such like should be the mode (of oath for a *Brāhmaṇa*) The test for determining the (truth or falsehood of the) deposition of the witness is declared thus :

If (what a witness) deposes is not less than (what is affirmed by the party citing him) in respect of place, time, age, the substance (*dravya*), the name, the caste, the measure, (the judge) should declare that the matter in dispute has been proved (by that party)

Yājñavalkya (II. 78) lays down a rule for decision when witnesses contradict each other

In case of contradiction the testimony of the majority should be accepted (i. e. prevails); if (the witnesses) are equally divided, the testimony of the virtuous set and if there be a conflict (of testimony)⁴ among virtuous witnesses, the testimony of the most virtuous should be accepted.

The same author (Yāj II 76) prescribes the fine for not deposing after having agreed to give evidence :

1. These two verses are ascribed to Kātyāyana by Aparārka. These verses are not found in the printed Vasisthadharmas'āstra (B. S. series) nor in its translation (S. B. E. vol. XIV).

2. This verse occurs in Nārada also (ppādāna 199).

3. This verse is not found in Mānū.

*P. 48 (text)

A person not giving evidence should be made by the king to pay the whole debt together with a tenth (part) added thereto on the forty-sixth day (after he is summoned).

Sarvam (the whole) means including the interest *sadasabandhakam* means 'together with a tenth part'. The *Mitākṣarā* states that the tenth part is to be taken by the king and the debt together with interest is to be taken by the creditor. The same author (Yaj. II. 82) lays down the punishment for one who having knowledge (of the matter in dispute) does not agree to give evidence as a witness.

He, who, having been called upon (along with others) to give evidence as a witness conceals it from others under the influence of folly, should be made to pay an eight fold fine; if (he be) a *brāhmaṇa* he should be expelled¹.

Such a witness is to be fined eight times as much as the fine inflicted in case of losing the suit. But a *brāhmaṇa* unable to pay the fine is to be expelled from the country and a *kṣātrīya* and the like are to be made to do acts proper for them (or to which they are accustomed). So says the *Mitākṣarā*. *Manu* (8. 108) says

That witness who after giving evidence is seen to meet with (the misfortunes of) disease, fire or a relative's death within seven days (of his deposition) should be made to pay the debt and a fine.

* *Yajñavalkya* (II. 80) says

If even after some witnesses have deposed (as to a matter in dispute) other witnesses more meritorious (than those already examined) or double in number (of those already examined) depose to the contrary then the witnesses first examined are false ones².

Nārada (p. 21 v. 62) says

* After a judicial proceeding has been almost finished proof whether documents or witnesses, would be useless unless the same had been announced before³.

1. The *Mit.* on *Yaj.* shows that this verse rather applies to a person, who, having agreed to give evidence and being cited along with others to depose, afterwards at the trial denies to other witnesses that he is a witness. It is *Yaj.* II. 77 that is the proper verse to be cited for the purpose of laying down a punishment for him, who, though he knows the matter in dispute, does not agree to come forward as a witness.

2. Vide notes to V. M. pp. 77-78 for explanation. This can only apply to a case where judgment has not already been pronounced, as the next verse of *Nārada* makes clear.

3. *Mandūk* (p. 22) Dr. Jolly (S. II. E. vol. 83 p. 31 note) and *Chakrapāṇi* (p. 41) translate *nirṇīta* by the word decided. But this is wrong. *nirṇīta* does not mean *nirṇīta*. It literally means cleansed thoroughly i. e. heard completely but not finally decided. Besides that interpretation would be opposed to the rules about review of judgment. Vide notes to V. M. pp. 72-80.

4. Compare C. Pro. Code Order 7 rule 11 (2) and 339 P. 41 text.

Yājñavalkya (II 83) states that in some cases witnesses may depose falsely and declares the penance therefor :

Where a man of the four castes would be liable to suffer death (if the truth were told), there a witness may depose falsely; for purification from that (sin of falsehood) an oblation of cooked rice should be offered to Sarasvatī by the regenerate classes¹

Viṣṇu (8 17) prescribes the penance for a śūdra (deposing falsely) ' a śūrad should give one day's fodder for ten cows ' *Ālāhikam* means ' as much as would be sufficient to feed them one day '

Here ends the section on witnesses

Now begins the section on ordeals §

That (an ordeal) determines a matter which cannot be decided by means of human proof It is of two kinds according as it determines at once or after some time Brhaspati (p. 315 vv 45) mentions the varieties of the first kind of ordeal ;

* Balance, fire, water, poison, kosa (sacred libation of water) as the fifth, the sixth is declared to be rice, seventh is a hot piece of gold, the eighth is the ploughshare and the ninth is known as springing from *dharma*.

Yājñavalkya (II. 95) declares that the first five are to be resorted to only in cases where the matter charged is of great value or is of a serious nature :

These ordeals, viz balance, fire, water, poison, kosa are meant for clearing (persons) of serious charges (or in valuable matters), when the complainant (or plaintiff) declares himself ready to undergo fine (following on a defeat in the trial by ordeal)

*S'īrsakasthe*² means ' who undergoes the fine consequent upon defeat. '

Pitāmaha says :

(The judge) should prescribe the balance and the other (four) ordeals for those who are proceeded against (or complained against) with assurance The ordeal of grains of rice and kosa (ordeal) are to be employed in cases of doubt (as to whether the defendant is the person who committed the wrong)

1. Sarasvatī being the goddess of speech it was appropriate that an offering should be made to her for deposing falsely. Compare Manu 8. 105.

2. The word ' S'īrsakasthe ' is thus explained. *S'īrṣam* means the head i. e. the fourth stage of a judicial proceeding (viz. the final judgment) It therefore indicates fine which is imposed on the defeated party. Therefore the word means ' one who offer to undergo the fine of defeat '.

* P. 45 (text), § Both Stokes and Mandlik omit the treatment of ordeals.

Avaṣṭambhaḥ means¹ certainty. Therefore the *kosā* ordeal can be employed in a charge made with certainty about the wrong-doer and also in one where there is a doubt. The *Kālikāpurāṇa* says

In charges of adultery of theft of intercourse with women who are forbidden, when one is accused of having committed a mortal sin and in cases of serious (or violent) offences against the king ordeals may be employed. In serious charges (of adultery etc.), in civil wrongs (such as non-payment of debt) and in cases where there is reviling the king should prescribe ordeals with an undertaking (on the part of the complainant or plaintiff) to pay a fine (in case of opponent's success in the ordeal). In grave charges such as that of adultery and in cases where there are many accusers (or plaintiffs) an ordeal may be prescribed in order that (the person accused) may clear himself (of the accusation) but without an undertaking (by the accuser) to pay a fine (in case of opponent's success in the ordeal).

Agamyāḥ (in the first verse from the *Kālikā-purāṇa*) means women other than others wives such as prostitutes and the like that are common (to all who visit them)², the word *śaṣṭe* means the same thing as *abhiśaṣṭe* (i.e. charged with the commission of a great sin), *adāsaṁ* means a wrong done with violence (or force), *avarāḥ* means abuse, *śraḥ* means fine. *The attribute (adultery with) another's wife (to the word *abhiśaṣṭe*) is not literally intended since what is intended to be repeated (or mentioned) as a topic (about which something is to be predicated) is *abhiśaṣṭa* (grave charge)³; similarly the words where there are many etc. also (are not to be literally understood). Therefore even in the absence of individual complainants an ordeal may be resorted to in the case of all charges (of mortal sins). The mention of the purpose in the words *suddhikāraṇāt* (for the purpose of clearing one's character) can also be well construed on this interpretation and also the following general proposition (can be well understood or construed)

1. This is a somewhat unusual sense of *agamyāḥ*. That word generally refers to such women as are forbidden for sexual intercourse (on the ground of its being incest).

2. Here Nilakanṭha refers to a Pāramimśadhya principle (which follows from Jaimini III. 1, 13-15). Vide notes to V. M. pp. 83-84. The conclusion of Jaimini is that though the Vedic sentences 'The cleanser the *graha* (cup) uses only the singular *graha*' yet all cups are to be cleansed. i.e. the singular number is not strictly limited and stands for the plural also. In the same way the word *paradāḥ* *abhiśaṣṭe* already occurred in the first verse. It is again repeated in the third verse where the point then to be laid down (the *śikṣā*) is that an ordeal may be resorted to for clearing one's character. The subject of which this is predicated is really *abhiśaṣṭa* (a grave charge) and not *paradāḥ* *abhiśaṣṭe* the word *paradāḥ* being only an attribute. *Abhiśaṣṭa* may be taken to include other *abhiśaṣṭas* also just as the singular number includes the plural. So also even if there be not many accusers or even more an ordeal may be resorted to for clearing one's character.

An ordeal) may be resorted to in cases of sedition and in (grave) sins¹ (Yāj II 96.).

Nārada says :

An ordeal without an undertaking to pay a fine may be prescribed for those who are suspected by kings (as offenders), who are pointed out by thieves (as their associates) and who are intent on clearing themselves

An oath is divine proof which determines a cause after a time Nārada (p 100 vv 248 and 250 for first verse and last half) enumerates its varieties .

Truth², riding animals and weapons, kine, grains and gold, the feet of a deity and one's father (or ancestors), one's gifts and meritorious actions (these may be sworn by) One may (solemnly) touch the head of one's sons, wife or friends (by way of oath) or in charges of all kinds (whether serious or trivial) the drinking of *koś'a* (sacred water) may be prescribed These are proclaimed by Manu as oaths (to be resorted to) in trifling matters

Koś'a, though it determines (a dispute) after the lapse of time, was enumerated among the first series (1 e among *tulā* &c above that decide a matter immediately), since it can be resorted to in serious charges also Yājñavalkya (II 96) says :

One of the two may undergo (the ordeal) if he likes, while the other may undertake to pay the fine (in case of defeat by ordeal)

*This option can apply only if the complainant (or plaintiff) so desires, but if he be unwilling, ordeals are to be prescribed for the accused (or defendant)³ alone, according to the *dictum* of Kātyāyana quoted in the Divya-tattva⁴ :

No one should ask the plaintiff or complainant to undergo ordeal ; those who are adepts in ordeals should offer ordeals to him who is the defendant (or accused).

Now (begins) the treatment of (the topic of) those who are fit (to undergo ordeals) Yājñavalkya (II 98) says .

1. Yāj uses the general word *pātaka* and not *paradūrābhīśūpa* (which is a particular sin) when prescribing an ordeal without fine, hence in the Kālikāpurāṇa also the word *paradūrābhīśūpa* is merely illustrative and includes other grave sins also (like *brahmahatyā*).

2 With the first verse, compare Manu 8 113 'Satyena &c' cited above Truth is to be taken with Brāhmanas, riding animals and weapons with Kṣatriyas, kine &c with Vaiś'yas. Any one may swear by the feet of his ancestors or of a deity The verse 'he may touch &c' does not occur in the printed Nārada Compare Manu 8 114.

3 The general rule as stated by Kātyāyana above was that the complainant (or plaintiff) was not to undergo a *divya*, but that it was the accused or defendant who was to do so But if the complainant chose he could himself undergo the ordeal and the defendant or accused may then undertake to pay the fine.

4. This is one of the works of Raghunandana,

* P, 47 (text)

The (ordeal of) balance (is prescribed) for women minors, old men, the blind the decrepit brāhmanas and the diseased fire or water (ordeal) is prescribed for (Kṣatriya and Vaiśya respectively) and for sūdra seven *varas* of poison

Strī means (any woman) without reference to caste age or any particular condition *bala* means a person of the age of sixteen and also of any caste, an old man is one who is beyond eighty years of age Balance alone out of the several ordeals is prescribed for a brāhmana at times which are common to all divyas as detailed later¹ but when it is the proper time for fire and other ordeals, they also can be administered (to brāhmanas) It is hence that Pītāmaha says

Clearing off (from guilt) by means of the ordeal of *kośa* is prescribed for all the (four) *varṇas* (principal castes) All these (nine ordeals) are proper for all persons, but not poison (ordeal) for a brāhmana
The Kālikā-purāṇa says

For the last of the *varṇas*² (i.e. for the sūdra) should be offered (the ordeal of) the heated golden *māṣa*

Nārada (p. 101 v 255 and p 118 vv 318-319 for last four verses) says

(The judge) should always examine by (the ordeal of) balance such nuchs, those devoid of courage (or mettle) those whose minds are in distress on all sides minors old men diseased persons and women *Poison is not prescribed (as an ordeal) for women nor water (the judge) should consider the hidden truth about them by means of the balance the *kośa* and the like Clearing (of guilt) by water is not prescribed for those who are diseased (or distressed) nor poison for those who suffer from biliousness, the ordeal of fire is not prescribed for those who suffer from white leprosy who are blind and who have had nails Women and minors are not to be plunged (in water as an ordeal) by those who know dharmaśāstra and also those who are diseased old or weak (The judge) should not plunge in water those who are devoid of energy who are ground by disease and those who are distressed, if they plunge in water they might die at once since they are known to have little vitality, these should never be plunged in water (as an ordeal) though they come (before the court) charged with heinous crimes nor should (the judge) cause them to carry fire (as ordeal) nor should he clear them with poison

115. Vide the verse of Pītāmaha quoted below Caltra..... these are the most common &c

116. According to the Vitz. *varṇatīya* means one who buffers on the *varṇas* 'L & a Mleccha.
P 48 (text)

Viṣṇu (Viṣṇu Dh S 9 29) says:

Water should not be prescribed for the phlegmatic, for the diseased, for flacid people, for those who suffer from difficulty in breathing and from cough¹.

Kātyāyana says:

Fire is not (prescribed) for those who work in iron (blacksmiths), nor water for fishermen nor should poison be ever offered (as ordeal) to those who know magic spells and *yoḡa* (The judge) should not prescribe the ordeal of rice for one who is observing a vow or one who suffers from a mouth disease

' *Vratī* means 'one who observes the vow of subsisting on milk and the like.'

Pitāmaha says:

Kośa should not be offered by the wife to those addicted to wine and women, to gamblers and to those who are unbelievers (atheists).

Nārada (p 117 v 332) says:

The offering of *kośa* (as an ordeal) should be avoided as regards him who has once been found guilty of a grave crime, who is destitute of *dharma*, who is ungrateful, who is impotent or who always finds faults, who is an atheist and who is sinful (or in whom faults exist).

Kātyāyana says:

The determination (of disputes) among the untouchables, among the lowest people, among slaves, among mlecchas who are evil-deers and among those who are born of unions in the reverse order of castes (i. e unions of females of higher castes with males of lower castes) should not be carried out by the king (in his court); on occasions (of dispute among them) he should direct them to undergo ordeals well-known among them.

Tatprasiddhāni means ' balance, serpent and the like ' If the person who should undergo an ordeal is unable to do so, the same author (Kātyāyana (as quoted in the Divyātattva says:

(The king or judge) should prescribe the proper (ordeal) without conflict with the time or the place. In case of inability (lit accident, reverse of fortune) ordeal should be carried out through a substitute. This is the rule (of law)

Anyena hārayet mean ' the ordeal should be performed by a substitute; '
viparyaye means 'when the person to undergo the ordeal is unable to do

1. This is not in the original a verse but a 'prose sūtra', while Nilakanṭha's reading makes it a verse. Viṣṇu reads ' na ś'loṣmavyādhyarḍitēṇām bhīrūṇām ..codakam'.

*P. 49 (text)

so (The judge) should prescribe the proper (ordeal) When it is positively known that a person at one time was guilty of patricide or of some mortal sin and subsequently (he is charged with another crime) and it is doubtful (whether he committed it) even in such case the same author (Kātyāyana) says that an ordeal must be performed by such a person through a substitute alone

* In case of those who are guilty of killing their mother father a *brāhmaṇa* a teacher (or elder relative) an old man a woman and a minor, particularly in the case of those who are guilty of committing one of the great sins and who are atheists, in the case of those who wear heretical sect marks, in the case of lascivious women and of those who are experts in magic spells and *gōyā* practices in the case of those who are born of the mixture (or confusion) of castes and those who are habitual sinners, when these people are charged again with those very reprehensible crimes the king who is devoted to *dharma* should take care not to prescribe an ordeal for them (to be undergone in their own persons) (The king) should prescribe an ordeal to be undergone by worthy persons appointed by these very (sinners) Where worthy persons cannot be found (willing to undergo an ordeal for them) they should be cleared by their own people (i.e. relatives should undergo the ordeal for them)†

Spakāśh means by their relatives

Now as to the time (for an ordeal) Pīlīmaha says

Caitra Mārgasīras and Vaiśākha, these are months common (to all ordeals) and not contrary to them The balance (ordeal) is declared to be (proper) for all seasons but it should be avoided when the wind is blowing. The fire (ordeal) is declared to be proper in the seasons of *śiśīra* *hemanā* and *vargā* (rain) Water (ordeal) is proper for *śarad* (autumn) and *grīṣma* (summer) and poison in *hemanā* and *śiśīra* (i.e. December to March)

The express mention of *hemanā* and *śiśīra* for the poison ordeal serves to indicate other seasons also (i.e. it is merely illustrative and not exhaustive) since it will be declared below in the rainy season the quantity (of poison to be administered in ordeal) is only four *yauas* (Nārada p. 116 v. 324) Nārada says

Kosa (ordeal) may be offered at any time and the balance also at all seasons.

1. The verse does not absolutely prohibit the prescribing of an ordeal for those men what is forbidden is that they are not to undergo an ordeal in their own persons, but through a substitute appointed by them.
P. 50 (text).

* Pitāmaha says :

Examination by fire (ordeal) should be made in the forenoon and the balance also in the forenoon.¹ Water should be offered in the noon by one who desires to secure the truth about *dharma*. Purification by *lośa* is prescribed for the first part of the day (forenoon), but poison should be given at night in the last watch, (as then it is) very cool.

Respectable people say that these ordeals should be resorted to on Sunday.²

Now as to the place (of ordeals). Pitāmaha says :

The balance should always be placed facing the east and motionless in a purified place, either in a famous temple of some God (such as India)³, or in the court-hall, at the royal gate or in a public square.

Nārada (p 104 v 265) says :

In the court room, at the royal gate and in the square of a temple (ordeal should be performed).

Kātyāyana says :

In the case of those men who are accused of the great sins, (the ordeal) should be performed in *indrasthāna* (place where Indra's banner is worshipped or some holy shrine) and at the royal gate in the case of those who are guilty of treason (or sedition). Ordeal should be offered in the public square to those who are born of unions in the reverse order of castes (i.e. unions of males of lower castes with women of higher castes). The wise declare that in matters other than these (ordeals should be performed) in the midst of the court hall.

Nārada says :

When ordeals are administered at an improper time and place and are undergone by the litigants outside (the village, i.e. away from the public gaze) they always fail (to be decisive) as to the matters in dispute ; there is no doubt about this.⁴

1 According to the Mit. the day of twelve hours is to be divided into three parts, the first part of four hours being called *pūrvāhna* (forenoon), the second *madhyāhna* (noon) and the third *aparāhna* (afternoon).

2. Vide Mit. on Yaj. II. 37.

3. The word ' Indrasthāne ' is explained ' as some well-known temple ' by the Smṛticandrikā, while the Divyatatva explains it as ' the place where the banner festival in honour of Indra is held. ' This last festival, where a banner in honour of Indra was worshipped, continued from the 8th to the 12th day of the bright half of Bhādrapada. Vide Bṛhatsamhitā chap 43.

4. Dr Jolly (S. B. E. vol. 38 p 250) is not right in translating the last half as ' they constitute a deviation from the proper course of a law suit '. The Smṛticandrikā and Parāśara-Mādhaviya say ' if the proper place and the like are disregarded, the ordeal loses its validity, this is declared in the words *adṛśakāla* ', &c.

* P. 51 (text)

*Now (begins) the procedure of the rites common to all ordeals.
Pitāmaha says

The judge knowing the *dharma* should after turning to the east and folding his hands, utter the following words and invoke the gods in the manner following come come, oh revered *dharma* and sit down (for decision) in this ordeal together with the guardians of the worlds¹ and the (eight) Vasus, the (twelve) Ādityas and the hoods of Maruts. Having invoked *dharma* to be present in the balance he should afterwards assign (proper places) to the subordinate (deities)² The same author (Pitāmaha) says

Having placed Indra in the east, Yama to the south Varuṇa in the west and Kubera in the north, he should assign Agni and the other guardians of the worlds to the intermediate points (south-east south-west &c.) Indra is yellow Yama dark Varuṇa of the lustre of crystal, Kubera has a golden complexion and so has Agni. So also Nirṛti is dark and Vāyu is said to be smoke-coloured, Isāna is red. (The judge) should contemplate upon these deities in these forms in order. The wise (judge) should invoke the Vasus to the southern side of Indra. Dhara Dhruva Soma Āpaḥ Anila Nala, Pratyūṣa Prabhāsa—these are enumerated as the eight Vasus. The place of the Ādityas is between that of Indra and that of Isāna (i.e. between the east and the north-east) Dhātṛi Aryamao Mitra, Varuṇa Amśa Bhaga Indra Ś Vivasvat Pṛṇao Parjanya as the tenth then Tvāṣṭṛ then Viṣṇo though born last not the least (but the highest of the twelve Ādityas) these are the twelve Ādityas enumerated by name. To the west of Agni is known the place of the Rudras. Varabhadra Sombhu, high famed Girisa Ajātakṣād Bhīṣṇudhanya Pinākin Aparājita Bhuvanādhisvara, heṣṭālin the lord of people Sthānu and the great Bhava—these are known to be the eleven Rudras. (The judge) should assign a place for the Mātṛs between Yama and the evil spirit (Nirṛti i.e. between south and south-west) Brāhmī Māheśvari Kaumārī Vairāvi Vārāhi Mahendri, Cāmupā together with her attendants (these are the seven mātṛs) The place of Gaṇeśa is known to be the north of Nirṛti and the place of the Maruts is said to be to the north of Varuṇa. Gaganaparama Vāyu, Aśla Māruta Prāṇa Prāṇasa and Jva—these are declared to be the seven Mārutas. The wise (judge) should invoke Dūrṇa to the north of the balance. These deities are to be worshipped after taking their respective names. (Having offered worship to Dharma beginning with

1. For the Lokapālas vide Maco 3. 2.

2. Dharma is the pitṛ, the deity to be invoked first, and the other deities from Indra to Dūrṇa (as detailed in the following verses) are subordinate.
T 62 (text). 8 P 63 (text). 11 64 (text)

*arghya*¹ and ending with ornaments in due order, he (the judge) should then get ready for the subsidiary deities the worship beginning with *arghya* and ending with ornaments and should offer (to *dharma* and the subsidiary deities) the service beginning with sandalwood and ending with *narvedya*.² He (the judge) should light fires in the four principal quarters and offer oblations at the hands of persons versed in the Vedas of clarified butter, *havis* (boiled rice) and fuel sticks that are the materials of *homa*. He should perform *homa* with the (sacred) Gāyatrī, *pranava* (the sacred syllable *om*) and add *svāhā* at the end

Havis means '*caru*'³ The revered Mimāṃsaka from the Grāṣa country (viz Raghunandana) says in his *Drīyatattva* that clarified butter, boiled rice and fuel sticks are to be offered to the same deities (*dharma* as principal and the rest as subsidiary), they are to be thrown on to the fire together (and not separately) as in the case of the *sānnāyya* offerings⁴ But this is not correct In this case it is impossible to have a single joint performance (*tantrātā*), as the means of offering (the three substances) are different viz. the *sruva* ladle is (the proper means) of offering *ājya* as said in the sentence 'he (the priest) divides with the *sruva*', the *sru* is (the proper means) of offering *caru* (boiled rice) as follows from the *sūtra* of Āśvalāyana⁵ and the like to the effect 'he covers once (with ghee the *juhū* ladle)', 'he divides off two portions of the boiled rice from the middle and the part of it to the east,' 'he sprinkles ghee over the boiled rice and over the portion divided off,' 'this is the characteristic procedure for all *avadānas* (offerings)'; and as the hand is the proper means for offering fuel sticks on account of its fitness In the case of the *sānnāyya* offerings (curds and milk), a single joint performance (offering of the two materials together) is proper, as the *juhū* (ladle) is the means of offering both The same author (Pītāmaha) says.

Having written down on a leaf (paper) the subject-matter for which the defendant (or accused) is proceeded against, the leaf should be placed on the head (of the person undergoing the ordeal) together with the following *mantra*

1. *Arghya* is water offered by way of honour.

2. This is some eatable, such as raw-sugar &c.

3. Vide notes to V M. p 83 for explanation of *caru*.

4. Vide notes to V M p 90 for *sānnāyya* and the proposition of Raghunandana explained in detail *Sānnāyya* is a name given to a mixture of curds and milk offered to Indra or Mahendra. As the deity is the same they are offered together Therefore Raghunandana argues that the three substances *ājya*, *havis* and *samīd* should be offered together For detailed exposition of this complicated passage and of *sruva*, *sru*, *juhū*, *sāmarīhya* and *tantra* vide notes to V M pp 91-93.

5. Compare Āśvalāyanagṛhyasūtra I, 10, 18 and I, 7, 10-12 for the passages referred to here.

*The mantra is (Mahābhārata ² Ādi-parva 74. 30)

The sun¹ the moon the wind fire heaven and earth waters the heart Yama, day and night the two twilights and dharma know (see or mark) the doings of men.

Nārada says

The judge being a brāhmana, who is versed in the Vedas and the Vedāṅgas (subsidiary lore such as grammar phonetics astronomy ritual, metrics, etymology) endowed with learning and character with an unruffled heart free from malice whose word is true who is pure and vigilant who is intent upon doing good to all creatures who has fasted who wears wet garments, who has brushed his teeth and who has performed the worship of all deities according to the prescribed rules (should administer ordeals)

Yājñavalkya (II 97) says

(The judge) having summoned at sunrise (the person who is to undergo ordeal) who has bathed and wears wet garments who has observed a fast (the previous day) should administer all ordeals in the presence of the king and the brāhmanas.

Pitāmaha also says

Ordeals should always be administered to persons who have fasted either one night or three nights who are purified and whose garments are wet
The same author (Pitāmaha) says

The king surrounded by good men should esteem this (mode of) purification and should please sacrificial priests family priests and preceptors with gifts. The king who causes this to be done after enjoying sweet pleasures, secures great fame and becomes fit for absorption into *Brahma*

Here ends the section on ordeals.

§ Now (begin) the rules for the balance (ordeal)

Pitāmaha says

The king should cause to be constructed a balance-shaped broad high and white-washed, sitting wherein (the person undergoing ordeal) would not be within reach of dogs cats and crows, it should have doors and contain grains (rice &c) should be guarded by servants should have drinking water and the like and should not be antenanted

¹ Compare Manu 8 (Cf. a similar verse.

p 23 (text) § P 26 (text).

Nārada (p. 103 v]) says :

(The timber employed) should be of the *Khadira* tree, but not the white variety and should not be worm-eaten

S'uklavarjitam means ' excluding the white *Khadira* '

(The timber) should be blackwood, or in its absence teak but without hollows, or Añjana, the inner part of Tindukī, Tiniś'a or red sandalwood.

But Mādhava reads ' (the timber should be) of Aijuna, Tilaka, Asoka, Tiniśa and red sandalwood.'

The king (or judge) should select such trees as these for making a balance (Nārada p 104 v 265)

Evam-vidhān means according to Madana ' these and other sacrificial (sacred) trees also such as Udumbara ' Hence Pitāmaha says .

Having bowed to the guardians of the worlds, and having cut down the sacrificial tree (*Khadira*), the balance should be prepared by the wise, after reciting the *mantra* as in the case of (making) a sacrificial post ; *and *mantras* addressed to Soma¹ and Vanaspatī should be muttered in a low voice when the tree is cut

Yūpavat means after reciting the *mantra* ' Oh, herb, save this sacrificer (Vāj S IV I.) As the mantras addressed to Soma and Vanaspatī are to be muttered and have an unseen result, they are both to be repeated (i e. there is no option)² The *saumya mantras* are well known The *Vānaspatya mantra* is ' Oh Vanaspatī (tree), may you grow with a hundred branches' (Rgveda III 8 11)' The line ' mantrah saumyo vānaspatyah' &c) merely reiterates what already follows from the extended application (*atides'a*) contained in the word ' yūpavad'³ Pitāmaha says

The (beam of) the balance was to be four cubits (in length) and the two supports (of the beam from which the balance was suspended) were to be of the same length (above ground) ; the distance between the two supports was to be two cubits or a cubit and a half

Vyāsa says .

1. Rgveda I. 91 is a hymn of 28 verses which are all addressed to Soma. The *saumya mantra* may either be 'somo dhenum' (I 91 20) or 'āpyāyasva sametu' (I 91.16).

2. This is based on the Pūrvamīmāṃsā XII. 4. 1, for an explanation of which vide notes to V M. p. 94.

3. The *mantra* 'vanaspate' is recited when a tree is cut for making a *yūpa* So when it is said that a sacred tree is to be cut with recitation of mantras as in the case of *yūpa*, it is not necessary to say expressly that the *mantra* 'vanaspate' should be uttered in a low voice But the verse does expressly say so It therefore does not lay down anything new, but only repeats what is already known. *Atides'a* is a principle in the Pūrvamīmāṃsā Anuvāda is a variety of Arthavāda and is opposed to *vidhā*.

* P. 57 (text).

The two supports (or columns) were to be implanted in the ground for two cubits

Pitāmaha says

The balance (i.e. its beam) should be a square (log) firm and straight and three (iron rings) should be fastened on to it with care
The same author (Pitāmaha) says

After suspending from the two ends (of the beam of the balance) two pans, he (the judge) should arrange on both the pans *darbhā* grass with their points turned towards the east. In the pan to the west he should have the person (undergoing ordeal) weighed and in the other pure earth, not mixed with bricks, ashes, stones, broken pieces of vessels or bones.

*Nārada (pp 105-106 vv 271-72) says

Having firmly suspended two pans from the two books attached to (the two ends of the beam of the) balance he should have the person (undergoing ordeal) weighed in one pan and gravel (or stones) in the other. He (the judge) should have the person (undergoing ordeal) held in (the pan on) the northern side and stones on the southern. He should have the basket (pan) filled with bricks dust and lumps of earth.¹

The same author (Nārada p 262 vv 27-29) lays down the mode of examining (a person by balance ordeal)

The examiners should bring the balance on the same level with the two pendants² (hanging down from the two arches) and (a little) water should be poured over the upper part of the (beam of the) balance by clever men. That balance was to be known (as *sama* (perfectly horizontal) on which the water so poured would not run down.

Pitāmaha describes the (suspending of) two pendants for (ascertaining the) horizontal position (of the beam)

Two arches should also be raised on both sides of the beam. They should always be *triṅgulas* higher than the balance. Two pendants should be suspended hanging down from the arches, tied with a string and made of clay and touching the upper surface of the (beam of the) balance.

1 Reading this verse with Pitāmaha. If how the *darbhā*, dust and stones are not totally forbidden as material for weighing the person and if, what is forbidden is the mixing together of all these. One may fill the pan with soil, earth, etc. or with brick dust not with all together.

2 As it is Pitāmaha's law that the balance is to be suspended from the two arches. They were to be only a little above the balance and from the arches two pendants were not to hang. It is natural that the beam was to be put in a horizontal position that the scale was to be in the position.

P 23 (last).

Pitāmaha says .

Having first weighed the man (to be tried by ordeal) and having made him get down from it, the balance being always adorned with banners and pennons, (the judge) knowing the *mantras* should then invoke the deities in the manner described (above) to the accompaniment of the beating of musical instruments and drums and with sandalwood paste, flowers and unguents

*Nārada (p, 252 v 29) says .

He (the judge) should first worship the balance with red sandal-wood paste, red flowers, with curds, cakes and husked grains of rice mixed with red powder and then he should honour the respectable people (assembled there)

Yājñavalkya (2 100-102) says :

When the person complained against sitting in (one pan of the) balance is equal (in weight) to the things (clay &c) against which he is weighed, a line (with chalk) should be drawn (on the arch showing the position of the pans) by those who are experts in handling the balance and the person being made to get down from the pan should invoke the balance in the following words ' Oh balance, you are the abode of truth, you were formerly created by the gods (for this purpose), therefore, beneficent one, declare the truth, and free me from this (cloud of) suspicion Mother, if I am a sinner, then take me lower, if I am pure, carry me upwards '

Nārada (p 106 v 276) says

Having put him under (spiritual) restraint by exhortations (about the results of untruth), the judge should again place him (in the balance) after putting upon his head a writing (about the matter in dispute) when the wind is not blowing and there is no rain

Samayāh parigṛhya mean ' having restrained with oaths. ' Viṣṇu (Viṣṇu Dh S 10 9) describes the oaths

Those (hellish) worlds which fall to the lot of those who kill brāhmanas and of those who are false witnesses will be yours, if you hold the balance falsely

Nārada (p 107 vv 278-279 , Viṣṇu Dh S 10 10-11) mentions that at the time of again sitting in the pan there is to be an invocation

‡You know the evil and meritorious deeds of all beings You alone know, oh god, what mortals do not know This man accused of a wrong in this judicial proceeding is weighed in you Therefore you will be

pleased to save, according to the dictates of dharma, him who is now under suspicion. You surpass in truth gods, demons and mortals, oh lord, your word is true in making clear what is pure and sinful. The sun, the moon (the same verse as above at p 60)

Pitāmaha says

A worthy brāhmana proficient in astronomy should examine the time. The time of five *vinādikā*¹ should be calculated by those who are experts in measuring the time of examination by ordeals. The king should appoint as superintendents (over the calculation of time) worthy brāhmanas who speak out as they see who are learned pure not covetous. All the superintendents (the brāhmanas) declare to the king the purification (by ordeal) or otherwise.

Vinādyah means 'palae' in accordance with the *smṛiti*.

The period required for (repeating) ten long letters is called *prāṇa* and *vinādikā* is equal to six *prāṇas*.

Nārada (p 207 v 333) says

If the person weighed in the balance is seen to go up (i.e. to be lighter than what he formerly weighed) there is no doubt that he is innocent but a man who weighs the same or goes down (i.e. weighs more) would not be innocent.

Vyrdhī means going up *hāni* means going down. Pitāmaha says :

The man whose guilt is light weighs the same while he whose guilt is great goes down (weighs more)

*Guilt is (said to be) light when the offence is the first one and not done of set purpose, but where by the very words of the writing put on the head (of the person weighed) it is ascertained that it was a first offence and committed without set purpose and where the only question was whether he was a guilty person if after undergoing the ordeal he weighs the same, the ordeal has again to be gone through since it is impossible (in such a case) to infer (from the fact of the same weight in both cases) that the guilt was light. Hence Bṛhaspati (p 317 v 19) says

He who weighs the same as before should be weighed again and he who goes up (weighs less) becomes victorious.

Kātyāyana mentions other reasons for again going through the ordeal.

The person should be again weighed when the scales snap or the (beam of the) balance breaks or the ropes go away and when there is a doubt about the innocence (of the man)

1. *Aṣṭa* (for *palae*) is unit the time spent in reciting 61 or syllables. Co. Vinādikā is either Ordeal or the time taken by a person to recite 61 syllables. P. 61 (text)

Vāysa says :

When the pan breaks, or when the beam of the balance or the two hooks break, when the ropes give way or the transverse beam (or the support) gives way, the king should then again resort to purification (by the same ordeal)

But this applies to cases where the breaking is due to some visible cause; when however the breaking is purely accidental, (the person undergoing ordeal) is certainly guilty, as declared in another *smṛiti*

When the pans or the beam of the balance or the hooks or the ropes or the transverse beam breaks, the king should declare the guilt (of the man weighed)

Kakṣa means 'the bottom of the scales'; *akṣa* means 'the support of the balance placed across the columns' The older writers (or eastern writers) say that only the weighing is to be repeated and not the whole procedure; but Madana says that the whole procedure is to be repeated (at the time of the second weighing) because the defect (in the act of purification by ordeal) is not removed in this way (by mere repetition of the weighing)¹

* Now (begins) the procedures of the rites (of the balance ordeal). The person, who is to perform the ordeal, should on an auspicious day in the morning approach one of the trees referred to above, should cut the tree with the *mantra* 'oh herb, save this person' (Vāj. S 4 1.), should mutter (the *mantra*) 'somo dhenum' (Rg I. 91 20) (of which) Gautama (is the sage), Soma (the deity), Trīṣṭubh (is the metre) and (which) is employed in *japa* (muttering of prayers) and the *mantra* 'Oh tree, (grow) with a hundred branches' (Rg III 8. 11) of which Gāthina Vis'vāmītra, *vanaspati*, *trīṣṭubh* (are respectively the sage, the deity and the metre) and which is employed in *japa*. After having bowed to the *lokapālas* viz. Indra and the rest one by one, he should erect a balance, (with a beam) four cubits long, of the thickness of four *aṅgulas*, having four faces, rounded in the middle and at the ends and (with a diameter) of four *angulas*, having in the middle on its upper surface and at the two ends but on their lower surface three hooks or rings. Then some say that he should construct a place seven or five cubits square raised (from the ground) to the extent of four *aṅgulas*. Then on that (raised) spot or on any other purified place two square pillars six cubits long should be driven into the ground to the extent of two cubits, having paired tops beyond the length of six cubits (on which the transverse beam was to be placed from which the whole balance was to be suspended) Above the ground four cubits (of the

1. The view of Madana is in accordance with the Kātyāyana-s'rāuta-sūtra I. 7. 28. It is not clear what view Nīlakanṭha himself holds. He merely places the two views in juxtaposition. But from the fact that he places Madana's view last and since he generally follows the Madanaratna it may be inferred that he held the latter view,

* P. 62 (text)

pillars) plus the portion of the pared tops thereof (were to remain) The distance between the pillars was to be two cubits or one cubit and a half. On those two tops was to be placed (transversely) a beam having in its middle but on the lower surface a support in the form of an iron hook ring or catch for holding the (beam of the) balance. From that (transverse) beam (on the pillars) was to be suspended the beam of the balance by means of the hook or catch on the upper part of it. At the end of the beam of the balance were to be tied two pans by means of three ropes each. To the east of the balance two posts at a distance of two cubits were to be fixed into the ground towards the north and south and over them is to be placed a log^o with its inside outwards. This is to be the *torana* (outer frame arch). And it should be higher by ten angulas than the balance frame. A similar one should be erected also to the west (of the balance). Two spherical pendants of clay should be tied with a string suspended from the (two sides of the) frame-work and made to touch the ends of the (beam of the) balance in order to ascertain the horizontal position (of the beam). On the two pans should be spread kus^a grass with their ends turned eastward. Then on a Sunday the judge who has observed a fast for a day should place in the western pan the person to be cleared (of his guilt by ordeal) who has taken a bath along with his garments after sunrise who has observed a fast for a day or for three days in case of ability to do so and in charges of grave sins, he (the judge) should then put in the pan to the east stones bricks clay or the like and so weigh that the two pans stand even. Truthful *brahmanas* and goldsmiths should examine this (viz the equipoise of the balance) by means of sprinkling water (on the beam of the balance). Then in order to make sure of the position (of the pan in which the person sat) reached at the time of the weighing (by the pan in relation to the *torana*) the judge should draw a line (on the *torana* with chalk &c) and should make the person (undergoing ordeal) sit down (from the pan). Then the person to be cleared having named the time and the place and having declared his intention in the words I shall perform such and such an ordeal in order to proclaim my innocence shall present clothes and and the like to the judge and four priests. The reverend *smarta-litahastacarya* (i.e. Raghunandan) says that *astatistama* and the like should also be performed. And the judge with fellow judges and the accompaniment of the beating of drums should invoke *dharma* (to be present) in the balance in the following manner

One come come several *dharma* and enter this oncal t eth r with the *Lokapālas* *Varuṣ* *Ādityas* and tribes of *Varuṣ*.

He should then involve the subsidiary letters. The very instructions (R-1111 of which) Mallabandula, Indira and Anandithi (and the

1. This case is not preventable. It was not any of our fault
small as I did not say that I was not a doctor. I was not a doctor.
P. 03 (1981)

sage, deity and metre respectively) is employed in invoking Indra In the same manner is to be understood the employment (of the following *mantras*) everywhere Having invoked Indra towards the east (of the balance) by *mantra* 'all (increase might of) India' (Rg I 11 1) (and with the words) 'India, come here and stay here', he (the judge) should contemplate upon Indra as yellow '*Yamāya somam*' (of which) Yama, Yama and Anu ṣṭubh~ (are respectively the sage, the deity and metre)¹ Having invoked Yama to the south with the *mantra* 'for Yama (strain) the soma' (Rg X 14 13) and with the words 'Yama, come here and stāy here,' he should contemplate upon the dark Yama 'Tvam no Vāmadevo Varunas-Tristubh' Having invoked Varuna to the west with the *mantra* ' O Agni, remove from us ', (Rg IV 1 4) and with the words 'come here, Varuna, and stay here,' he should contemplate upon Varuna who is of the lustre of crystal. Having invoked Kubera to the north with the *Yajus* formula 'to the over-lord of kings' (Tai Ā. I 31 127, Mysore ed) and with the words 'Come here, Kubera, and stay here', he should contemplate upon Kubera of the golden complexion 'Agnim Medhātithir - Agni Gāyatri' Having invoked Agni to the south-east with the *mantra* ' we choose Agni as (our) messenger ' (Rg I 12 1) and with the words 'Come here, Agni, stay here' he should contemplate Agni of the golden colour 'Mo su no Ghorah Kanvo Nirrtir-Gāyatri' Having invoked (Nirrti) with the *mantra* 'may not kill us' (Rg I 38 6) and with the words 'here &c ', he should contemplate upon the dark (Nirrti) 'Tava Vāyovyas'vo Vāyui-Gāyatri' (Having invoked) as in the preceding cases (Vāyu) with the *mantra* 'O wind, your protection' (Rg VIII 26 21) and (with the words) 'here' &c , he should contemplate upon the smoke-coloured (Vāyu) 'Tam-is'ānam Gautama Is'āno Jagatī'. Having invoked (Īs'āna) with the *mantra* 'we invoke that lord' (Rg I 89 5) and with the words 'here &c ' he should contemplate upon the ruddy (Is'āno). To the south (of the place where) Indra was invoked 'jmayā atra vasavo Matīāvaruno Vasi'tho Vasavas-Tristup' Having invoked the eight *Vasus* with the *mantra* 'O Vasus, here on this earth' (Rg VII 39 3) and with the words 'come here, stay here', (he should) contemplate upon them.

¶ Dhara, Dhruva (this verse occurs above p 48) 'Tyān-nu Sāmmado Matsyo dvādas'ādityā Gāyatri' Having invoked between Indra and Is'āna, the twelve Ādityas with the *mantra* 'indeed those ksatriyas' (Rg VIII 67 1) (he should contemplate on them) Dhātā, Aryamā (these two verses are translated above p 48)

'Ā Rudrāsah s'yāvās'va ekādas'a'rudrā jagatī ' To the west' of Agni having invoked the Rudras with the *mantra* ' O Rudras, come' (Rg V. 57 1) and with the words ' here ' (he should contemplate &c).

1. In each of the following cases, before the actual *mantra* [is cited, we have the pratikas of the *mantra* (the first words for recognising it), its ṛṣi (sage), its *devatā* (deity) and metre The translation therefore does not set out all these details in brackets hereafter

* P. 64 (text), ¶ P. 65 (text).

and the rest as before (i e according to appropriateness) The sandalwood paste and the flowers to be employed in the balance ordeal and in the worship of *dharmā* should be red, but those for the worship of Indra and the rest may be (red) if available (or of any other colour) The judge is to perform the whole procedure of the ceremonial up to this stage Then, after kindling domestic fire in the four directions by means of four sacrificial priests *homa* (burnt offering) should be performed. *In doing that, having first uttered the sacred *Gāyatrī* together with ' om ' and having uttered the syllable ' om ' with ' *svāhā* ' at the end, the priests should throw into the fire for *savitr* (the Sun) 108 times each offerings of clarified butter, boiled rice and fuel sticks Then the person complained against should write on a leaf (or paper) the matter charged against him and also the following *mantra* . The sun, the moon (this occurs above p 50) Then the leaf (or paper) should be placed on the head of the person complained against who is to be cleared (of guilt) All these details beginning with the invocation of *dharmā* and ending with the placing of the writing on the head are common (the same) for all ordeals Then the judge should recite (the following) *mantra* before the balance by way of exhortation

Oh balance (*dhātā*), thou wert created by Brahman for the purpose of testing those who are wicked Thou art named *dhātā*, thou, being *dharmā* as the letter " *dha* " shows, detectest, when held (as a balance), the crooked man, as the letter *tā* (contained in the word *dhātā*) indicates¹ Thou knowest the evil and meritorious deeds of all beings which mortals do not know, thou alone knowest every thing This man charged (of a wrong) in this judicial proceeding desires to be cleared of it, therefore thou wilt please save him from the suspicion according to (the dictates of) righteousness

Then the person charged should recite the following *mantra* before the balance (Yāj IJ 101-2)

Oh balance, thou art the abode of truth ; thou wert created by the gods in times of yore Therefore speak out, auspicious one, the truth and free me from suspicion ¶ If, mother, I be a sinner, then carry me downwards, if I be innocent, raise me high up

Then the judge should have the accused person, who has the writing on his head, placed in the balance occupying the same place (i e pan) and the same position (relatively to the torana), and should keep him there in the same condition for five *palas* (i e two minutes) At the

1 This gives a fanciful etymology of the word *dhātā*,

P. 67 (text) ¶ P. 68 (text).

time the innocence or guilt should be examined by pure brāhmanas and should be communicated to the king and the *sabhyas* (members of the court). Then the (person charged) should get down from it (the balance) and should please the judge, the brāhmanas and the priests with fees (*dakṣiṇā*) according to his means. Then having taken leave of the deities with the *mantra* arise Oh Brahmanaspati (Rg I 40 1) and with the words may the tribes of gods depart he should hand over everything to the judge.

Now (begins) the method of the fire (ordeal)*

Pitāmaha says

I shall proclaim the method of fire (ordeal) as laid down by the *s'āstras*. He should prepare eight *maṇḍalas* and a ninth in front (or to the east of them). Those who know the vedas declare that the first *maṇḍala* (circle) is that of Agni the second of Varuṇa, the third of the god Vāyu, the fourth of god Yama the fifth of Indra the sixth of Kubera the seventh of Soma the eighth of Savitr (the Sun) and the ninth of all the gods.

Madana¹ however, read (the passage) as the eighth is of all the gods while the ninth that is to their east is a large one and belongs to the Earth. The *maṇḍalas* should be constructed with cowdung and should be sprinkled with water. The same author (Pitāmaha) declares the extent of the circles (Nārada p 109 vv 235-236)

The distance of one circle from (the beginning of) another is declared to be thirty two *angulas*. In this way the eight circles would come up to two hundred *angulas* plus fifty-six. This is the way in which the ground is to be divided.

The word *maṇḍalāḥ* means from the beginning of a circle. The meaning is that the ground covered by one circle and by the space intervening (between it and the next circle) would together come up to thirty two *angulas*. Here each circle is to be of sixteen *angulas* (finger-breadth) and the space between two circles is also to be the same as Yājñavalkya says (II 106)

A circle is to be known to be sixteen *angulas* (in extent) and the intervening space was to be the same.

1. For Madana, the author of the encyclopedic work on dharma called *Madana ratna*, vide my *History of Dharmasāstra* pp. 329-333. He flourished between 1350-1450 A.D., p 62 (text)

If the foot of the person to be cleared be more than sixteen *angulas* in length, ¹ then the intervening space (between two circles) would be less than sixteen *angulas*; if the foot of the person to be cleared be less than sixteen *angulas*, then inside the circle of sixteen *angulas* another circle of the length (i.e. diameter) of his own foot should be drawn. As to what Nārada reads after the words 'in this way two hundred *angulas*', viz. 'forty more of the ground calculated in *angulas*' (Nārada 4 286), that has to be interpreted as leaving out of calculation that part of the ground that is covered by the space intervening between the eighth and ninth circles, as (that space) was not to be traversed (by the person performing the ordeal). Similarly the reading of Kalpataru ¹ '(plus) twenty-four (*angulas*) is declared to be the allotment of ground' has to be interpreted as stating the extent of *angulas* after omitting (from calculation) the first circle in which (the person undergoing the ordeal) has to stand.

In each circle are to be placed *lus'as* as laid down by the sūtras and the settled rule is that the person performing the ordeal should plant his foot on them.

In the Mitākṣarā and the Madanaratna (we read) 'he should offer into fire ghee 108 times as a propitiatory rite' and Viṣṇuśāraṇa says that this *homa* should be accompanied with the *mantra* 'agnaye pūvakūya svāhā' (oblation to fire, the purifier). Nārada says (p. 109 iv 288-289):

A person who is a blacksmith by very birth (caste), who is clever in kindling fire and who has seen the procedure (of fire ordeal) on other occasions should heat in fire a ball of iron till it becomes red hot and emits sparks and should guard it (from profane touch).

Pitāmaha says

He should heat in fire on all sides an iron ball of eight *angulas* and weighing fifty *palas* ² having made it even and without edges.

† The Kālikāpurāṇa says .

The king should give to the person charged a rounded iron piece weighing fifty *palas* and twelve *angulas* long and, blown red hot.

S'ankha-likhita declares that the (iron) ball is to weigh sixteen *palas* 'or having held in his folded hands an (iron) ball of sixteen *palas*, covered

1. This oft-quoted work was composed by Lakṣmidhara under the Kanauj ruler Govindacandra (1104-1155 A. D.) Vide History of Dharmasāstra pp. 815-818.

2. Each *pala* weighed 320 *gunjas* according to the Lilāvati. Vide notes to V. M. p. 104. According to Raghunandana, 20 *palas* were equal to 66 *tolas*, five *māṣas* and four *gunjas* and 12 *guṇjas* were equal to one *māṣa* and eight *māṣas* equal to one *ṭola*. Vide notes to V. M. p. 111.

* P. 70 (text), † P. 71 (text),

with seven *asvattha* (fig tree) leaves and made red hot. This holds good when (the person undergoing the ordeal) is weak (and not able to carry a heavy ball of 50 *palas*). The iron ball is to be heated thrice as declared by Nārada (p 109 v 290) when heated by the third heating. Having first heated it and then plunged it into water having again heated it and plunged it in water when it is being heated again (a third time) the judge should perform (all the details described above) beginning with the invocation of fire and ending with placing the writing on the head (of the person performing the ordeal). Here Pitāmaha declares a special rule as to the worship of fire.

The king should cause the worship of fire to be made with red sandal, red incense and red flowers.

Hārta says

(He) should stand facing the east stretching out the fingers of his hand with wet garments, pure and with the leaf (or writing) placed on his head.

The word *s'odhya* (the person to be cleared of guilt by ordeal) is to be understood here. Pitāmaha says

He should stand in the first circle facing the east with folded hands and purified.

Nārada (p 110 v 301) says

He should make red marks on all sores of the hands (of the person undergoing ordeal) and should examine them again (after the ordeal) to see whether they (the hands) are marked with the identical dots.

Yājñavalkya (II 103) says

Having marked the hands of the person on which grains of rice have been rubbed he should cover them (the hands) with seven leaves of the *asvattha* (fig) tree and should fasten round them as many threads (1 or seven).

Vijñānesvara holds that the word '*idat'*' is an adverb and that the meaning is that he should pass the thread (round the leaves) seven times while Madana holds that the meaning is that he should pass round (the leaves) only once a string of seven threads, the word *idatāśīra* (being a single compound word and) meaning a bundle of as many threads (as seven). Pitāmaha says

He should place on the hands (of the person to be cleared) seven Pippala leaves auspicious grains of rice flowers and ourds and there is also to be a fastening of threads round (all)

The *mantras* to be recited by the judge here before the fire in the iron ball as invocation will be declared in (the section on) the procedure of the rites Yājñavalkya (II. 104-105) says

Oh fire, the purifier, thou movest within all beings, wise one, declare like a witness the truth about me from out of sin or righteousness When he (the person performing ordeal) has uttered these words, (the judge) should place in both his hands the iron ball that weighs fifty *palas*, that is even (without edges) and that glows red

Pitāmaha says

The king who is devoted to *dharmā* or (the judge) appointed by him taking hold of it (the red-hot iron ball) with a pair of tongs should place it in his hands

*Nārada (compare p 110 v 296) says

He (the person undergoing ordeal), being urged on by the judge and holding in both his hands that (the red-hot ball), should stand in one circle and then walk straight over the other seven circles (so that he then reaches the eighth)

Pitāmaha says

He should not walk hurriedly, but should go slowly and at ease. He should not pass over circles nor should he plant his foot in the intervening space (i. e. he must plant his foot in such a way as to exactly cover the diameter of each circle) Having reached the eighth circle, the wise man (who performs the ordeal) should throw (the red-hot ball) in the 9th circle

The (red-hot iron) ball is to be cast in the ninth circle covered with grass, as the Kālikāpurāṇa says

He should go over seven circles measuring sixteen fingers each with like intervals (between the circles), having gone (to the eighth) he should throw (the ball) on green grass

Pitāmaha says:—

Then (the judge) should throw (rub) on the hands (of the person performing ordeal) grains of rice or barley, when his hands are rubbed with them without any hesitation and show no change (or injury) at the end of the day, (the judge) should declare him to be innocent (or to have succeeded in the ordeal)

Kātyāyana says —

If the person charged loses his footing or suffers burns elsewhere than in the proper place (i. e. on other parts of the body, not on the hands),

the gods declare that that is not a (real) burn (i. e. not a blemish in the man), he should be again made to undergo the ordeal

* Yājñavalkya (II 107) says

If the (redhot iron) falls earlier (i. e. before reaching the eighth circle) or when there is a doubt (whether his hands are injured or not) he should again carry the (redhot) ball.

Now (begins) the procedure (in sequence of the ceremonial of the ordeal of fire) On the previous day the ground should be purified and the next day nine circles should be drawn. But of them the first should be of sixteen *angulas* (in diameter) and in front of it ground measuring thirty-two *angulas* should be divided into two parts in the second of which the second circle should be made of the same extent (diameter) as the foot of the person who is to walk (over the circles) the remaining will be the space (between the first circle and the second) Having in the same way made the circles from the third to the eighth together with the spaces intervening between them a space of sixteen *angulas* should be left in front (of the eighth circle) and the ninth circle should be made of any extent (diameter) whatever In this way the eight circles together with the spaces (kept after each) will together come up to 256 *angulas*

Eight *yavas* (barley grains) placed together by their breadth or three grains of rice with ends against each other (i. e. placed lengthwise) are the measure of an *angula* a *vitasti* is equal to twelve *angulas* the cubit is equal to two *vitastis* (spans of the hand) a *daṇḍa* is equal to four cubits, while a *krośa* is equal to 2000 *daṇḍas* and a *yojana* is four *krośas*

(The measures of length) *vitasti* and the rest will be of use later on.¹ Then having worshipped in the nine circles beginning from the west the superintending deities of each viz Agni Varuṇa Vāyu Yama, Indra Kubera Soma Savitṛ and all the gods and having kindled ordinary domestic fire to the south of the ground occupied by the circles, the judge should offer *ghṛa* by way of propitiary rite 108 times with the words *sudhā* to Agni the purifier Then having cast into that fire a round iron ball without edges, that is smooth eight *angulas* in diameter, weighing fifty *palas* and having performed the series of rites from the invocation of *dharma* to the offering of oblation into the fire as detailed above in the balance ordeal while the iron ball is being heated the judge, when the ball has been heated the third time should recite the following *mantras* by way of invocation before the fire in the (heated) iron-ball.

‘Thou, Oh Agni, art the four Vedas and to thee offerings are made in sacrifices, thou art the mouth of all the gods and of all *brahmadāins*,

1. I.e. in the section on water ordeal and on disputes between master and cowherd.
P 74 (text) P 75 (text)

(expounders of *Brahma*); since thou dwellest in the stomach of all beings; thou knowest the good and evil (that men do); thou art called *pāvaka* (purifier) as thou cleanseest out sin. Manifest thyself as regards sinners, oh purifier, and send out thy flames, or oh Fire, become pure¹ as to those whose minds are pure. Oh Fire, thou movest like a witness inside all beings, thou alone knowest, oh god, what men do not know. This man, accused of a wrong in a judicial proceeding, desires to be cleared (of it); therefore thou wilt please save him from this suspicion according to the (dictates of) *dharma*².

Tṛtīya-tāpah (heating the third time) means 'in order to purify the iron, throwing into water the iron ball that is well heated, again heating it and throwing it into water, and then again heating it'. Having held by means of a pair of tongs the iron ball that is well heated and so red-hot and before which *mantras* have been recited as above, and having brought it in front of the person performing the ordeal who has observed a fast, who has bathed, whose garments are wet and on whose head is tied the writing embodying the subject matter of dispute and who stands in the westernmost circle, the judge should place it on the hands (of the person undergoing ordeal) that have been purified (or treated in manner following) after the person has recited by way of invocation the *mantra*.—

Thou, Oh Agni, Purifier, movest inside all beings; wise one! declare the truth about me out of meritoriousness or sin (i. e. whether I am innocent or sinful) like a witness³.

The word '*kṛtasamīskārayoh*' (that have been purified) means 'that are folded after grains of rice are rubbed over them, that are marked with *alaktuka* (red dye) in places where there are dark *sesamum-like spots, wounds, or hardened skin, that have placed in them seven leaves of *Aśvattha* of equal length or in case the latter are not available, seven leaves of the Arka plant, seven leaves of *S'amī* or of *Dūrvā*, sacred grains of rice, and also grains of rice smeared with curds and flowers; and that (hands) are covered over seven times with seven white threads. Then the person performing the ordeal, planting his foot just on the circles (i. e. so as to exactly cover them) from the second to the eighth and having thus walked slowly seven steps, should cast the (red-hot) iron ball held in his folded hands on to the ninth circle. Then after his hands are again rubbed with grains of rice, if they are (found to be) unscorched, he is pure (innocent),

Here ends the method of the fire ordeal.

1. The reading of Mit. and Aparārka 'be cool' for 'be pure' is decidedly better,

2. The last two verses are Viṣṇudharmasūtra II, 11-12,

3. This is Yaj. II, 104.

* P. 76. (text)

Now (begins) the method of the water ordeal

Pitāmaha (says)

Henceforward I shall declare the ancient and proper method of water (ordeal) A wise (judge) should get a circle (of ground) prepared (cow-dunged) He should piously worship arrows with incense and lamps and a bamboo bow with auspicious rites, flowers and incense and then carry on the rites (connected with the ordeal)

The word *dhūpadīpābhyām* (with incense and lamp) is to be connected with the words *śarāṇ sampūjayet* (he should worship the arrows) And the worship is to be performed in the (cow-dunged) circle Nārada (p. 112 v 307) speaks of the lengths of bows

A formidable bow measures 107 (*angulas*) a middling one is declared to be 106 in length and a feeble (of lowest length) one is known to be 105 This is the detail about bows. A clever man, placing a target at (the distance of) 150 cubits (from himself) should discharge three arrows with a middling bow

**Saptasāṭam* means 'hundred and seven *sāṅgulas* In the same way are to be explained *śaṣṭasāṭam* and *pañcasāṭam* Kātyāyana says

He should employ for the purpose of purification (by water ordeal) arrows the points of which are not made of ~~metal~~ but of pieces of bamboo, while the person discharging (the arrows) should discharge them forcibly

Nārada (p. 257 v 53 p 256 v 51 and p 258 v 58) says —

Having gone to a reservoir of water one should erect on its bank a *torana* as high as the ear (of the person performing ordeal) on a holy and even plot of land He having his mind composed should first offer worship to Varuṇa with fragrant sandal paste and flowers and with honey milk and ghee. A strong man, either a Brāhmana, Kṣatriya or Vaiśya free from love or hatred (for the person undergoing ordeal) should be made to stand like a post in water as deep as his navel.

Pitāmaha says —

The king should first make a person hold the post (of a sacred tree like *khadira*) and stand in water facing the east and having made the person who performs the ordeal to stand in water he (the king) should invoke the gods and should recite mantras before the water

Dvādaśa means *dharma* and the rest He should perform (the rites) beginning with the invocation of *dharma* and ending with the placing of the

writing on the head (of the person performing ordeal) The *mantras* to be recited by way of invocation will be found in the *prayojā* (the detailed description of the sequence of the rites given below).

Vyāsa says :¹

Having invoked water with the word ' Oh Varuna, save me with truth ', he (person performing ordeal) should dive into the water, holding the thighs of the person who stands in navel-deep water

Kam means ' water ' and *abhis'āpya* means ' having recited *mantras* before it '. Brhaspati (p 318 v. 21) says :

After making the (strong) man enter the water, three arrows should be discharged :

*Pitāmaha says :

The discharger (of the arrows) should be a *kṣatriya* or even a *brāhmaṇa* subsisting by the same calling (viz that of a *kṣatriya*); he should not be cruel of heart, should be peaceful, pure and should have observed a fast

Kātyāyana says :

When (the arrows) have been discharged, (the person undergoing ordeal) should dive into the water and at the same time (another person) should run (to the place where the second arrow is lying)

The meaning is ' simultaneously with the diving ' (running should be done). Nārada (p 113 vv 309-312) and Pitāmaha say :

A young man possessed of speed should run with his utmost strength from the place whence the arrows were shot (i e from the torana) to the place where the second arrow fell. Another man of the same sort (i e young and swift) taking the second arrow then returns with speed to the place whence the other (young) man started (i. e to the torana). If the (young) man who carries the arrow does not see when he comes (to the torana) the person (the *s'odhya*) who had dived into the water, then (the judge) should declare (the *s'odhya*) to be pure (innocent); otherwise he would not be purified, even though only a single limb (such as the ear) were seen or even if he were to float to a place other than where he was first made to enter (i e. where he dived)

The word *ekāṅgasya* should be construed as referring to the ear. And so Kātyāyana says :

(the king) should declare him also to be purified whose head alone is seen after he plunges into water, but neither the ears nor the nose. -

1. This is also Yāj 2. 108,

* P. 78 (text),

Pitāmaha says :

It is the place where the arrow first fell that is to be taken, the distance covered by its creeping is to be left out of account

•Nārada (p. 258 v 57) says

Those two who out of fifty runners would surpass in speed the others should be appointed for the purpose of bringing the arrow

Now begins the ceremonial in sequence (of the water ordeal) The place of water that is to be used (in this ordeal) should be a river the sea a deep reservoir reservoir near a temple a lake or a pond the water whereof is not agitated Soanty waters, or those that are brought artificially or that are full of weeds, moss, waves, mud, sharks, leeches or fish or the like or that flow rapidly, should be avoided. In such water that is navel-deep a post of *dharma* made of sacrificial tree (viz *khadira*) should be implanted. Near it on the western bank (of the water) a *torana* (an ornamental arch or structure) as high as the ear of the person performing ordeal should be raised. Near it should be placed a bamboo bow of 108 *angulas* and three bamboo arrows the ends of which are not made of iron. The target should be erected in a good spot at a distance of 150 cubits from the *torana*. Then having worshipped the bow together with the arrows with white sandal paste and white flowers, having invoked Varuṇa in the reservoir of water and having worshipped him (Varuṇa),¹ having carried out (the rites) beginning with the invocation of *dharma* and ending with oblations to fire that have been already described and having tied on the head of the person to be cleared (by ordeal) the writing containing the matter of complaint the judge should invoke water with the following mantra

Water! thou art the life of living beings thou wert created the first in creation thou art declared to be the means of the purification of substances and embodied beings therefore show thyself in (this) investigation about righteousness and sin

Then the person (who performs the ordeal) should recite the mantra 'satyena mūkhirakya tvam Varuṇa (Ya; II 108 p 87 above) Then the person who performs ordeal should approach the strong man who holds fast the post of *dharma* who faces the east and who stands in water navel-deep. Then from the place where the bow was kept a *ṣṣātrīya* or a *brahmana* pursuing the former's avocation should firmly shoot towards the target three arrows that have no iron points. Then one swift person should stand holding the middle arrow at the place where the arrow fell not minding the distance over which it crept and another (equally) swift man should stand at the foot of the *torana* whence the arrows were discharged. And a swift man (here) is one who

1. In the *Śyva* and in later mythology also Varuṇa is the lord of waters, *Vide* *Bṛ. VII 49 3 yāsam rāṇ Varuṇo yāti &c.*
P, 79 (text). 3 P 80 (text)

surpasses in speed fifty runners. Then the judge standing at the foot of the torana should clap his hands thrice and simultaneously with the third clap the person undergoing ordeal and the swift man at the foot of the torana should (respectively) dive and run fast. The diving should be done after holding the thighs of the person who holds fast the post of *dharmā*. Then when (the swift man) reaches the place of the falling of the middle arrow the (other swift man) who stands there holding the arrow should go fast to the *torana* and if he finds the person performing the ordeal still inside the water then he is cleared (of guilt) He is cleared even if only the head is seen, but not if he sees some other limb such as the ear or if he (the s'odhya) floats to some spot other than where he dived. Here ends the method of water ordeal.

Now (begins) the method of poison ordeal.

On this point Nārada (p 260 vv 69-70) says —

After having worshipped Mahes'vara¹ (S'iva) with incense, offering (of food) and *mantras*, one should, after observing a fast, administer poison (by way of ordeal) in the presence of gods (idols) and *brāhmanas*. A brāhmana, whose mind is concentrated and who faces the north or the east should administer (poison as ordeal) only in the presence of *brāhmanas* to a person who stands facing the south.

The same author (Nārada p 115 v. 324) states the quantity of the poison (to be administered) ;

In the rains the quantity (of poison) is to be of the weight of four *yavas* (grains of barley), in summer it is declared to be five *yavas*, in *Hemanta* (i. e. December and January) it is to be seven *yavas* and in S'arad (i. e. October-November) of less quantity than the latter.²

*Alpā' (of less quantity) means ' of three *yavas* ' *Hemanta* includes (the season of) s'is'ira also (i. e. February and March) as S'ruti (the Veda) compresses the³ two (seasons into one) ; while *Vasanta* (spring, April and May) follows as a matter of course, as it is declared (vide above p. 46) as a common season for all ordeals. Viññānes'vara holds that in that season also the quantity of poison is to be seven *yavas*. And poison should be administered with ghee thirty times as much, since Kātyāyana says :—

1. S'iva is to be worshipped here most appropriately as in mythology he swallowed the terrific *hālāhala* poison that sprang up when the ocean was churned by the gods.

2. According to the Mit. and the Vir., this last means ' of six *yavas* . '

3. This is a reference to the Atareya-Brāhmana I. 1., where we have ' there are five seasons in a year, Hemanta and S'is'ira being compressed into one, '

*P. 81 (text),

To human beings poison should be administered (as ordeal) in the forenoon and in a cool spot after mixing it with ghee thirty times as much and after powdering it well

Yājñavalkya (II. 110) states how poison is to be invoked

Poison! thou art the son of Brahman thou art firm (or fixed) in the duty of (deciding) the truth. Save (me) from this accusation and be like nectar to me by truth (i e. if I be innocent)

Nārada (p. 116 v. 326) says :

He (the person performing poison ordeal) should be kept in the shade, should be guarded for the rest of the day without food. If he be not affected by the (ordinary) effects of poison (till the end of the day) then Manu says that he is purified (innocent)

The same author states another period (of waiting) when the quantity of poison is very large

When a man shows no change (due to the circulation of poison) for a period of five hundred clappings of hands, then he is purified (he should be declared innocent) and then medical treatment should be resorted to (to cure him)

In the system (treatises) on poison the stages of the working of poison (are stated to be the following)

The first 'working' of poison causes horripilation the next after that (causes) perspiration and dryness of mouth, the next two (workings) produce in the body change of colour and tremor, the fifth stage of working (gives rise to) restlessness of the eyes hoarseness of throat and hiccough the sixth causes heavy breath and loss of consciousness and the seventh causes the death of the person who swallows the poison

Here (the person performing the ordeal) is to swallow the poison placed before Mahādeva (an idol of Śiva) by the judge who has observed a fast

' Now (begins) the method of the ordeal of kosa (holy water)

Pitāmaha says

A man should be made to drink the water (of the worship) of that deity of whom he is a devotee, but if he be equally a devotee of all deities (i e. if there is no special predilection in favour of one particular deity) he should be made to drink the water of (the worship of) the Sun. The water (of the worship) of Durgā should be given to thieves and to those who live by the profession of arms, but a brāhmana should not be made to drink the water of the Sun.

Bṛhaspati (p. 318 v. 23) says

1. This verse is quoted in the Mīt. (on Yāj. II. 111)

* p. 83 (text).

Having washed the weapons of that deity to whom the person charged is devoted, he should be made to drink three handfuls of that water.

Nārada (p 262 v. 81) says :

Having summoned the person charged and having placed him in a (cowdunged) circle facing the Sun, (the judge) should make him, who has taken a bath, whose garments are wet and who is pure, drink three handfuls (of holy water) according to the ritual described before (as common to all ordeals).

Nārada (p 262 v 82) says ;

Having worshipped that deity (to whom the person charged is devoted) and having washed (the image of that deity) with water and having repeated (before the deity) his wrong-doing, (the judge) should make him drink three handfuls (of the holy water).

Here having observed a fast (the previous day), having in the forenoon worshipped the deity (that is a favourite with the person undergoing the ordeal), having taken the water used in bathing the (image of the) deity, having performed (all the details) from the invocation of *dharma* and ending with the placing of the writing on the head, the judge should invoke that water with the *mantra* that is given in (the section on) the water ordeal. The person performing the ordeal also having recited the *mantra* by way of invocation as stated in the same (section) should swallow (the water).
Brhaspati (p 318 v. 24) says .

There is no doubt that if no misfortune is seen to visit him (who performs the kośa ordeal) or his son, wife and wealth within a week or within two weeks (from the day of the ordeal), he is innocent¹

*Now (begins) the method of (the ordeal of) rice.

Here Pitāmaha says

I shall declare the method of grains of rice about which information is conveyed in (works) defining it Grains of rice are to be given (as ordeal) in theft and in no other case² ; this is settled Grains of rice (*S'ālī*) and of no other corn should be made white (i e unhusked) (The judge) should place, himself being purified, those (grains of rice) before the (image of the) Sun in an earthen vessel, mix them with the water in which the image of the Sun is bathed and keep them there (i e immersed in that water) for that night, having first of all performed on that night according to the *s'āstra* the rites beginning with the invocation (of *dharma* and other deities).

1. Compare Yāj. 2. 113 and Viṣṇu. Dh S XIV 4—5. The period of seven days applied to light offences.

2. This is only illustrative. It only means that this ordeal was employed only where the disputes related to money.

* P. 83 (text).

Kātyāyana also says

In (the ordeal of) swallowing the grains of rice immersed in the water of the bath of the deity (the person performing it) should be decided to be pure (innocent) if the saliva (that he spits) is unmixed (with blood) and should be decided to be impure (guilty) if it be otherwise¹

Pitāmaha (= Nārada p 119 v 342) says

(The judge) should declare him to be impure (guilty) who shows blood (in his saliva) whose chin and palate are shattered whose body has a tremor

Now (begins) the method (of the ordeal) of the heated mass (of gold)

Pitāmaha says

I shall declare the good method of the heated *māṣa* (of gold) in freeing (men from accusations) (The judge) should have a round vessel of iron or copper or clay made of sixteen *angulas* (in diameter) and four *angulas* deep. He should get it filled with ghee and oil weighing twenty *palas*, *when the latter (ghee and oil) are well heated (the judge) should then cast in it a gold piece weighing a *māṣaka*² He (the person performing the ordeal) should take out the heated golden *māṣaka* with the thumb and the fingers of his hand.³ If he does not jerk his fingers or there is no scalded skin (when he takes out of the ghee and oil the heated piece,) he whose fingers are uninjured should be declared to be innocent by virtue of his righteousness.

The same author (Pitāmaha) describes another method (of this ordeal)⁴

He (the judge) being pure should put cow's ghee in a vessel of gold silver iron or clay and have it heated on fire. He should cast into it a beautiful seal-ring washed once with water and made of gold silver copper or iron. When (the ghee) is full of whirling ripples and bubbles and when it is not capable of being touched (even) with the nails he should test it (i. e. whether it has reached the boiling point) with a green leaf so as to produce the sound of churu.⁵ Then he should once repeat the following *mantra* by way of invocation before it (the heated ghee) Thou art Oh ghee, the holiest thing

1. According to Nārada (pīṭhina 311) he should be made to spit on a leaf of *akroṭha* or *bhūrja*.

2. A golden *māṣaka* was equal to five *kṛpālas* (*gunjas*)

3. The forefinger and the middle finger were to be joined to the thumb in taking out the heated piece of gold.

4. These five verses are also Nārada's (pp 112-120 vv 814-48)

5. When ghee reaches the boiling point, if a green leaf were dipped into it, there would be a sound similar to the word *churu*. This is the test for finding out whether the ghee has reached the boiling point.

P. 84 (text).

in sacrifices, thou art nectar, oh purifier ; burn him (the person undergoing ordeal) if he be a sinner, be cool as ice if he be pure' Then he (the judge) should make him (the person performing the ordeal), who has fasted, who has taken a bath, who comes with wet garments on, take out the seal-ring from the midst of the ghee. Then persons who are (appointed to) supervise (the ordeal) should examine his forefinger. That man is pure whose skin is not scalded ; otherwise he is impure (guilty)

The method of (ordeal by) ploughshare.

Brhaspati says (p. 313 v 28)

The ploughshare (*phāla*) is said to be of iron, weighing twelve palas and eight angulas long and four angulas broad. *The thief should lick it once with his tongue when it is red hot. If he is not burnt, he establishes his purity (innocence), if otherwise he loses (i.e. he is guilty)

Now (begins) the method (of ordeal) based on (image or picture of) Dharma.

Pitāmaha says.—

I shall now describe the method of testing by means of *Dharma* and *Adharma* men who are guilty of causing bodily injuries, or who have monetary disputes or who desire to undergo penance (for sins) He should have prepared a silver (image of) dharma and a leaden or iron (image of) adharma or he (the judge) should draw on *bhūrja* (birch leaf) or on a piece of cloth dharma and adharma (respectively) of white and black colour. Having sprinkled (over the images or pictures) *pañcagavya*,¹ he should worship (dharma and adharma) with sandal paste and flowers. (The image or drawing of) dharma should be worshipped with white flowers and adharma should wear dark flowers. Having performed these rites and applied sandal-wood paste to them, he should place them (images or drawings) inside two balls which are made of cowdung or clay. The two should be placed unseen inside an unused (i.e. new) earthen vessel in the presence of gods (idols) and brāhmanas and in a cowdunged and holy spot. He should then invoke the gods and *loka-pālas* as laid down already (in the section on rites common to all ordeals p 48) After having invoked dharma he (the judge) should write on a leaf (or paper) the subject matter (of dispute or complaint) 'If I am free from guilt, may (the image or drawing of) dharma come to my hands'—(saying this) the person charged should quickly catch hold of one (out of the two images)² If he takes hold of dharma he is (to be declared)

1. The five things with which this is prepared are the dung, urine, milk, curd, clarified butter of a cow.

2. This procedure closely resembles drawing lots.

* P. 85 (text).

Innocent if he takes hold of adharma he loses (i.e. he is guilty). In this way has been briefly declared the testing (of an accused) by means of dharma and adharma

Bṛhaspati* (p 319 vv 30-33) says —

Dharma and adharma should be drawn on two leaves (respectively) as white and dark. Having invoked them with *mantras* that infuse life (into images¹) and with *śāman* hymns like the *Gāyatrī*² and others he should worship them with sandalwood paste and with white and dark flowers. Having then sprinkled *pañcagavya* over them and having placed them inside clay balls of equal size they (the clay balls) should be placed unobserved in a jar. Then (the person performing this ordeal) should quickly take out of the jar one of the balls. If dharma is drawn then he is (to be declared) pure and should be honoured by those who tested him

Now (begins) the procedure³ (in sequel of the various items in this ordeal). Having drawn a white image of dharma and a dark one of adharma on two leaves having recited the *mantra* *dm hrīm kraum ham yam, ram, lam vam, śam sam sam hamsa*⁴, the *prāṇas* (life) of dharma (may be present) here again having recited the life of dharma is again established here having (ceremonially) endowed with life the painting of dharma, with these words may all the sense organs of dharma speech, mind, eyes, ears, smell and *prāṇas* (life-breaths) come here happily dwell here long. *svāhā* and having invoked (dharma) with the recitation of the *Gāyatrī śāman* if it be known or if unknown with the recitation of the *Gāyatrī mantra* together with the *Vyāhritis*⁵ and (the sacred) syllable *om*, having worshipped dharma and adharma with a white and a dark flower respectively having sprinkled *pañcagavya* (on the paintings of dharma and adharma) after uttering *om* having placed in two clay balls dharma with the white flower and adharma with the dark flower he (the judge) should place it in a fresh (unused) jar. The judge⁶ should then perform the rites beginning with the invocation of dharma and ending with the *homa* to fire and should tie on the head of the person to be cleared the writing containing the subject matter of dispute to the accompaniment of (appropriate) *mantra*. The person to be cleared (of guilt) should say 'If I am free from sin, may, dharma come to my hand and should take out

1. This refers to *mantras* that are prescribed for *prāṇa-pratiṣṭhā* (infusing life or endowing with godhead) of images. Vide notes to V 11, p. 112.

2. Vide Śāmareḍa (B I ed. vol. V p. 601) for *Gāyatrī śāman*.

3. The whole of this *prapya* to the end occurs *trabalim* in the *Divyatattra* of Raghunandana.

4. For these mystical words compare *Agalpurāṇa* chap. 21.

5. The *Vyāhritis* are the mystic words *bhūh, bhuvah, sva-*
P, 85 (text). 7 P 87 (text)

from the jar one of the two (clay balls) If dharma is taken out (by him), he is (declared) innocent Then he should distribute gifts.

Now (begin) oaths.

Manu (8 113) says .—

A brāhmaṇa should be made (this occurs above p 39).

Brhaspati (p 315 vv 6--7) says¹ :—

*Truth, riding animals and weapons, cows, seeds and gold, the feet of gods and brāhmaṇas, the heads of one's sons and wife, these are said to be (the forms of) oaths always ready at hand where the matter (in dispute) is small (not serious) In the case of *sāhasas* (heinous offences or offences accompanied with force) and accusations (of mortal sins) ordeals are said to be the means of purification (i. e. of establishing innocence)

Yājñavalkya (II 113) says :—

There is no doubt that that man is pure on whom no formidable calamity due to God or the king befalls within fourteen days (from the time of his taking the oath).

Ghoram means ' formidable ', as in the *Mitākṣarā* (it is said) that slight misfortune cannot be avoided by human beings. *Kātyāyana* also says :—

*That man who is not visited by any formidable calamity due to God or the king up to the fourteenth day (from taking oath) is to be regarded as pure by his oath

Vyasanam means ' misfortune ' *Ghoram* means ' causing great affliction ', since *Vācaspatimis'ra*² and *Smārtabhāṭṭācārya* (i. e. *Raghunandana*) say that slight affliction is characteristic of (human) bodies *Kātyāyana* again says ----

If within two weeks (from taking oath) there is contradiction (with the oath) shown by misfortune, he (the king) should by all means make the person charged to deliver the subject matter (of dispute) and a fine. If to the man alone (who takes oath or performs ordeal) and not to all alike, befall disease, fire, or the death of a near relative, he should be made to pay the debt and a fine Fever, dysentery, boils, great pains in

1. Compare with these *Nārada* (*ṛnādāna* 248--250) quoted above on p 43.

2. Vide the Indian Oaths Act (X of 1873) for modern provisions as to oaths and affirmations

3. *Vācaspatimis'ra* wrote several works on *dharma* styled *Cintāmaṇi*, his *Vivāda-cintāmaṇi* being a work of great authority in Mithilā He flourished towards the latter half of the 15th and in the first quarter of the 16th century. Vide 'History of *dharma-s āstra*' pp 399--405.

*P. 88 (text),

the deep-seated bones, eye disease, disease of the throat insanity headache and fracture of the arm—these are the diseases of men which are (to be regarded as) due to (the wrath of) God

Dastavāsamāde means in case of the death of a near relative and the like By the words *śasyakasya* (when it befalls him alone) are excluded epidemic diseases (like cholera) that affect a whole locality (at once) In this passage as the word *śasya* refers to the word *abhyukta* (the person charged) that already occurs (in the preceding verse) disease and the rest are an indication of defeat when they befall only the person charged and not when they befall his son or the like That (disease or the like indication) again must be great (serious or formidable) and not slight. This has been already said above With this very idea Vācaspatimīra says the meaning is that disease and the rest that are peculiar to the person charged (and not common to all) are indications of defeat It is therefore that the text mentions only the death of a near relative and not the disease of a near relative.

The determination of heritage.*

Now (begins the discussion of) ownership that is useful in the determination of *dāya* and the like. And that (ownership) is a kind of capacity arising from purchase, acceptance (of a gift) and the like. That purchase and the like are the causes of ownership is understood from worldly usage alone and not from *s'āstra*¹ (alone), since it (the notion of ownership) is seen even among those who are ignorant of *s'āstra* and since it is more cumbersome to suppose that ownership springs from (the prescription of) *s'āstra* (than the other theory) Bhavanātha² also in his work called *Nayavivoka* says the same thing As to the text of Gautama (Dh. S. 10. 39-42) ' ownership (arises) by *riktha* (heritage), purchase, partition, seizure (of things unowned) and finding (of hidden treasure &c.); in the case of brāhmaṇas, what is acquired (by gift) is an additional (source of ownership), in the case of ksatriyas, gains of conquest (are an additional source) and *nirves'a* (profit making and service) (is an additional source of ownership) in the case of *vais'ya*s and *s'ūdras* (respectively)', it merely repeats the sources (of ownership) that are already known from ordinary worldly life³ People employ the word *riktha* to denote that which becomes one's own by the mere extinction of the (previous) owner's property therein. The word *mātra* (mere) is used (in the above definition of *riktha*) to exclude purchase and acceptance (from the denotation of *riktha*⁴). In this passage (of Gautama) the word *riktha* is capable of denoting such an extinction (of ownership) only, since it is mentioned along with (other) means of ownership such as purchase and the like⁵ and on account of the maxim ' (the

1. Whether the question of ownership (over a thing) is understood from *s'āstra* alone or from the usage of worldly people is a subject very elaborately discussed in the Mit The Smṛtisaugraha and Dhāres'vara held the former view, while the Mit, the Vir. and most writers support the latter. Vide notes to V M pp. 114-115 for a statement of the reasons given by both sides for their views

2. He is a mīmāṃsaka who wrote a commentary on S'abara's Bhāṣya As the Smṛticandrikā quotes him, he is earlier than 1150 A D. Vide p 480 of the notes to V. M.

3. Those who say that ownership springs from *s'āstra* rely upon Gautama's text as a support. They argue that if ownership were *laukika*, Gautama need not have written an elaborate passage. To this Nilakantha gives a reply in the following rather elaborate passage. Several digressions come in while Gautama's text is being expounded Anuvāda (that merely repeats) is opposed to *vidhūyaka* (that prescribes). Vide notes to V. M. pp 164, 368 for *vidhi* and *anuvāda*

4. In the case of *riktha* the moment the previous owner dies his son or grandson becomes owner without any further act In the case of a gift or purchase, the donee or the purchaser must do some act (such as accepting the gift or taking possession &c).

5. The argument briefly is this — *riktha* in popular parlance means 'wealth which becomes one's own on the death of the previous owner' But in Gautama's sūtra 'purchase, partition &c' are *means* of acquiring wealth and *not* wealth itself Therefore *riktha* which is associated with them must also convey 'means of acquiring wealth' and not wealth itself. In the ordinary popular meaning of *riktha* two notions are combined viz *wealth* and mere extinction of previous ownership as a means of acquiring it Out of these two in Gautama's text we must understand the latter as the meaning of *riktha*. Vide notes to V. M. pp. 116-117,

* P. 89 (text).

apprehension of a thing does not arise) unless the attributes of the thing are (first) apprehended¹

Dhāres varicārya² and the author of the Smṛtisaṅgraha say 'partition generates ownership for the sons and the like in the wealth of the father which (ownership) while the father was living did not at all exist before in the sons'³. But this is not correct, since by such texts as 'by birth itself (sons) acquire ownership over wealth'⁴ it is conveyed that the birth of a son by itself produces over the father's wealth ownership which is limited by the relation of sonship and since Yājñavalkya (II 121) says⁵

The ownership of both father and son is the same in land acquired by the grandfather in *śibandha* and in chattels

1. Vide notes to V M. pp. 117-118. When we say *Dapdi puruṣa* we cannot correctly apprehend the man (the *viśeṣa*) unless we first understand *dapda* (stick) which is an attribute of the man. *Rūṭika* in popular parlance conveys two notions viz. wealth (the *viśeṣa*) and extinction of ownership as the means (the attribute of that wealth). Therefore when we understand the latter (i.e. the attribute) we can understand the whole notion of *rūṭika*, i.e. the first notion that strikes one when the word *rūṭika* is used is the extinction of former owner's ownership and therefore that is the primary meaning of the word in Gautama's text.

2. Dhāres vara is king Bhoja of Dhār, one of the most famous patrons of literature in India. He reigned between 1006 and 1063 A.D. Vide 'History of Dharmasāstra', pp. 275-279. He is quoted by the Mī.

3. There were two views, viz. that ownership arises (first) on partition of what did not belong to a man before that date or that partition takes place of that which already belonged to one's self (though jointly with others). The former is the view of Dhāres vara and Jimutavāhana, the latter of the Mī. and a host of writers. The latter 'Dhāres varicārya' correct are quoted in *Bai Parson v Bai Somai* I L.R. 36 Bom. 424 at p. 429 where it is said that the contrast between by birth and by partition is significant because therein lies the root idea or basic principle of the coparcenary system as distinguished from a tenancy in common.

4. This text is attributed to Gautama by the Mī, and several other writers and is variously read, while Jimutavāhana Aparīkṣa do not refer to it and a few writers like B. rīkṣa Tarkīlāhikā say that it is spurious. It is not found in the printed Gautama Dh. S. Vide notes to V M. pp. 119-121 for details.

5. The words by birth chattels are quoted in *Jugmohandas v Sir Mangaldas* I L.R. 10 Bom. 523 at p. 547. *Pitāmabopāṭa* is rendered as 'received from the grand father by Mandlik at p. 82 but on p. 43 as acquired by the grandfather. Telang J in *Apali v Ramchandra* I L.R. 16 Bom. 23 at p. 50 translates as above. Vide *Somaiābāi v Somaiārao* I L.R. 5 Bom. 83 at p. 40 where it is said that an ancestral trade may descend like other inheritable property upon the members of a Hindu undivided family.

6. The word *śibandha* means a grant of a fixed payment at stated times such as a year or a month to a person or temple, generally under the orders of a king, such as so many betel leaves out of each load of betel leaves sold &c. Colebrooke translated the word as *corrody* but, as was observed by their Lordships of the Privy Council in *Maharaja Fattisangji v Desai Kallianraji* I L.R. 11 A. p. 31 31 it was not a very happy translation of it, since *corrody* a word of medieval origin properly signifies a peculiar right viz. the grant by the royal or other founder of an abbey of certain allowances out of the revenue of the abbey in favour of a dependent or servant. Vide *the Collector of Thana v Hari Sitarām* I L.R. 5 Bom. 518 (P.B.) at pp. 555-559. *Lakṣmāndas v Monohar* I L.R. 10 Bom. 149. *Jalindra Mohan v Ghanshyam* 50 Cal. 360 at p. 371 for various definitions of *śibandha*. Vide *Collector of Thana v Krishnanath* I L.R. 5 Bom. 312 at pp. 331-332 for a discussion of what was included in *śibandha*.

It cannot be said that this (text) conveys that the cause of the production of ownership is the death of the grandfather and not the birth of the son,¹ since (if that view were accepted) there would arise the unacceptable result that a grandson not born at the death (of the grandfather) would have no ownership (in what was his grandfather's property). Really speaking, the word *pitāmaha* (in Yājñavalkya's text 'bhūyā pitāmahopātā) is not intended (to be taken literally), because otherwise it would follow that there is absence of equal ownership (in father and son) in what is acquired by the great-grandfather or the like, and because it (the word *pitāmaha*) is an attribute of the *anuvādyā*² (the subject). As to the text of Devala.³

When the father is dead, the sons should divide their father's wealth, for as long as the father who is free from any defect (bodily or mental) lives, there is absence of ownership in them.

The first half (of this verse) only enjoins the time of partition, as the potential termination is found (in the word *vibhajeyuh*), while the latter half only commends the time (of partition laid down) and indicates that the sons are dependent, but is not to be construed as laying down absence of ownership (in them during the father's lifetime⁴). This (interpretation) explains the text of Śaṅkha also viz. 'while the father is alive, the sons should not divide the *riktha* and also whatever might have been acquired by them after (they were born), sons are not entitled (to separate in the father's lifetime), as they are not independent (of him) in matters of wealth and the

1 This is directed against those who, like Jimūtavāhana, hold that ownership even in ancestral property arises not by birth but on the death of the previous owner. Vide notes to V. M. p 121.

2 The word *anuvādyā* means 'subject', about which something is to be enjoined and is contra-distinguished from *vidheya* (predicate or what is to be enjoined). In the text of Yājñavalkya what is to be enjoined is equal ownership of father and son. The subject (*anuvādyā*) of which this is enjoined is *bhū* (land). *Pitāmahopātā* is only an attribute of the subject *bhū* and forms no part of what is enjoined with reference to *bhū*. Hence it is not to be taken literally, but only illustratively. So nothing turns on the mention of *pitāmaha* (which stands for 'ancestor') and that passage says nothing about the death of the *pitāmaha*. Vide notes pp 121-122 to V. M. for further explanation and the two other ways in which Yājñavalkya's verse is explained in the Dāyabhāga.

3. This text of Devala is a sheet anchor of the Dāyabhāga theory.

4. The potential is used in laying down *vidhis*. In the word *vibhajeyuh* (should divide) we have the potential termination and so that portion enjoins a rule. What follows gives the reason and so is a mere arthavāda and not to be taken literally. Vide Jaimini I. 2 26-30 (hetuvān—nigadādhikarāna). Arthavāda only expatiates upon or recommends a *vidhi*. Nilakantha draws a distinction between *svatva* (ownership) and *svātantrya* (absolute power of disposal). A woman owns her *strīdhana*, she has no *svātantrya* over it (excepting *saudāyika*) during her husband's life-time.

* P. 20 (text).

(chapter of Jaimini's Pūrvamīmāṃsāsūtra) that the whole earth cannot be gifted away by the emperor and a country by a feudatory chief. The ownership in the several villages and fields in the whole earth or in a country (maṇḍala) belongs to the holders of the land alone, while kings are entitled only to collect taxes (from them¹). Therefore when now (kings) make what are technically called gifts of fields no gift of land (the soil) is really effected but only provision is made for the maintenance (of the donee on the tax which is alienated to him by the king). Where however houses and fields are purchased (by the king) from the holders (thereof) he has also ownership in them and therefore he secures the merit of the gift of land (in such cases). *Ārāṇyaka* (in Gautama's text) means

what is acquired by agriculture money lending, trade and rearing of cattle and what is acquired by service since the lexicon (of Amara) says that the word *ārāṇyaka* means hiring for service and enjoyment. *Bhṛta* (in Amara's lexicon) means service and *bhoga* (enjoyment) means money lending and the rest. Here the first (meaning of *ārāṇyaka* viz money lending &c) is (an additional source) in the case of vaiśyas and the second (viz service) in the case of śūdras. Hence that purchase and the rest are sources (of ownership) follows from ordinary worldly affairs (and not from sūtra). It is in this way that the popular convention of ownership in the calf born of one's own cow becomes consistent, but this would not be so if the sources of ownership were to be understood from sūtra alone since sūtra does not tell us that being born of one's cow is a means (of ownership).

(An objector urges) it would follow that there is ownership over one's sons and daughters since they are born of one's wife just as (there is ownership in the calf) because of its birth from one's own cow. If it be said that this (that is urged as an objection) is an acceptable proposition then it would be in direct conflict with the conclusion established in the sixth (chapter of the Pūrvamīmāṃsāsūtra) that although it would seem to follow that daughters and sons should be given away (in gift) as the gift of one's all is enjoined (by the Veda) in the *Viśvāyā* sacrifice one gives one's all yet daughters, sons and the like (relations) cannot be given (by way of gift in *Viśvāyā*²). (This objection) is not (proper) as there being

1 This embodies an important proposition that the state is not the owner of all lands, but is only entitled to levy a tax.

2 In the Pūrvamīmāṃsāsūtra VI 7 1 2 there is a discussion on the vedic text. In the *Viśvāyā* &c, where the conclusion established is that one's parents and no other relations cannot be gifted away but only such things of which one is absolute master (problem). As regards the question whether there is ownership over wife and children the Mīm. and Mayūkhya differ. The Mīm. says that there is ownership over one's wife and children (on Yāj. 2 1 4) while the Mayūkhya repudiates this doctrine. Both however are agreed that wife and children cannot be the subject of gift, the Mīm. saying that it is so because there are special texts prohibiting the gift of them and the Mayūkhya saying that the gift cannot be made because there is no ownership over them. The *Vir* follows the Mīm. Vide notes to V M. pp. 127-128. In *Kaṭhaka* & *Sow* pp. 21 Bom. L. R. 27 at p. 812 the words of the Mayūkhya there being absence of ownership, born of her are quoted.

absence of ownership over one's wife while there is (ownership) in a cow, there is no ownership over the offspring born of her (the wife); and (further) in worldly experience being born of what is the subject of ownership is alone understood to be the cause of ownership (in the things produced).

If it be urged (as an objection) that there is ownership in the wife also on account of accepting her (at the time of marriage when she is given away¹), (the reply is that) this objection is not proper, since there being absence of (²the privilege of) accepting a gift for ksatriyas, there will be no ownership over their wives and therefore there will be none even in the children born of them. Therefore (i.e. for this very reason), since it is only a person of the same caste that can be adopted as son on account of the text (of Yāj II 133) 'this rule propounded by me applies to (the twelve kinds of) sons that are of the same caste (with their father)', the acceptance of a son in adoption, so far as the ksatriyas are concerned, can only be in a secondary (or figurative) sense³. Nor is it possible to take acceptance (of a son) in the primary sense even as regards brāhmanas, since in that case (i.e. if acceptance be understood in the primary sense with brāhmanas and in the secondary sense with ksatriyas) in the texts enjoining that (i.e. adoption of a son) there will be conflict inasmuch as (the same word acceptance) will have been used in two different senses at the same time. Nor can it be said that the rite of acceptance of a son (in adoption) is permitted only to brāhmanas and not to ksatriyas and the rest, since from the words of S'aunaka and others such as 'a daughter's son and a sister's son are given (in adoption) to a s'ūdra', it is understood that they (i.e. ksatriyas and the rest) are entitled to perform that (the ceremony of adoption). Similarly in the case of the marriage of a brāhmaṇa with the daughter of a ksatriya (and the like) in the *brāhma* form, both the gift and the accep-

1 In the Gṛhyasūtras marriage it said to be the gift of the bride whose hand the bridegroom accepts. Vide Ās'valāyana Gr S I 6 1 and I 7 3.

2 According to Manu 10 75 and 77, acceptance of a gift, teaching of the Vedas and officiating as priests in a sacrifice were the peculiar privileges of brāhmanas alone.

3 The texts on adoption speak of the *gift* of a son e.g. (Manu 9 168 'whom the mother or father gives with water &c'). A *ksatriya* can adopt only a *ksatriya* according to the text of Yāj (II 133). But a *ksatriya* cannot accept a gift. Therefore when it is said that a *ksatriya* boy is to be given and accepted by a *ksatriya* the word 'acceptance' cannot apply in the case of *ksatriya* in its primary sense, but only in a figurative sense. The texts that enjoin adoption (like Manu's) are applicable to all castes. Therefore it will have to be said that the same word for acceptance is used in two senses in the sentence, in the primary sense when applying to *brāhmanas* and in a figurative sense when applying to *ksatriyas*. But this is not a legitimate method, since the Pūrvamīmāṃsā-sūtra (I. 3 23, I 4 8 and III 2 1) says that in one *vidhi* text, the same word cannot be used in two senses. Hence it follows that the word acceptance is used in a figurative sense (in adoption) as regards *brāhmanas* as well as *ksatriyas*. Vide notes to V M pp 123-130. There are three *vr̥ttis* (functions) of a word, *abhidhā* (primary), *lakṣaṇā* (secondary sense), *vyangjanā* (suggestive sense).

tance (of the girl) would have to be admitted to be in a figurative sense and in other cases (viz marriage of a brāhmana with the daughter of a brāhmana) both (gift and acceptance) would have to be admitted to be in the primary sense—thus there will be conflict inasmuch as two senses (of the same word in the same rule) will have to be resorted¹ to. That the *brāhma* and other forms of marriage are in vogue among *kṣatriyas* is not disputed by any one². *Therefore the revered Mīśra (Pārthasārathi mīśra) says in his *Tantraratna*³ that the gift of a son and the like is to be understood in a figurative sense. Nor can it be assumed from the popular use of such language as one's own wife sons and daughters, that there is ownership in them since (the use) of that word (viz *sva*) can be also explained as expressing relationship as in one's own father one's own mother' and the like. And the word '*sva*' does possess the power of expressing relationship also since the lexicon (of Amara) says *sva* when masculine is used in the sense of relationship or one's self in all the three genders in the sense of what belongs to one and when not in the feminine (i.e. in masculine and neuter) it means wealth. As to the

1. This doctrine of the *mīmāṃsā* is referred to in *Śhramacarya v. Ramacarya* 11 Bom. L. R. 654 at p. 671 (= 23 Bom. 452) *Telaram v. Narayan* 36 Bom. 822 at p. 356 (F. R.), 6 Cal. 112 at p. 126 (F. R.)

2. The whole discussion is started for showing that there is no ownership in wife and children. Nīlakaṇṭha cites the illustration of an adopted son and argues that there at least the gift of a boy and acceptance are not meant to be literal, but in a figurative sense similarly in marriage also, the acceptance of a girl by the husband is not like that of a chattel, but is only figurative. If a *kṣatriya* married a *kṣatriya* girl in the *brāhma* form he being a *kṣatriya* is not entitled to accept a gift so though the essence of the *brāhma* form according to Manu (III 97) and others is the gift of the girl, there can be no acceptance by a *kṣatriya* in the primary sense. Hence in the daughter born of such a marriage there can be no real ownership (as there is none in her mother). Therefore if a *kṣatriya* gives his daughter in marriage to a *brāhmana*, the gift (*dāna*) is also figurative and therefore the *pratigraha* (acceptance) also is figurative. But if a *brāhmana* gives his daughter in marriage to a *brāhmana* both gift and acceptance will be in the primary sense. Therefore in the general rule about the *brāhma* form which is applicable to the three classes, the words gift and acceptance would have to be used in two different senses, which is condemned by all rules of interpretation. Hence both gift and acceptance must be regarded as figurative in all cases of marriage. The author brings in the *brāhma* form because it might be argued that in the *vālaka* form as the girl was forcibly carried away (Manu III 33) the husband became her owner. Modern decisions also hold that the presumption as regards marriage in the three higher classes and even among respectable *Śūdras* is that the marriage is in the *brāhma* form. Vide *Jaganath Baghunath v. Narayan* 34 Bom. 553 at p. 553.

3. The *Tantraratna* is a work of Pārthasārathi mīśra wherein he explains passages from *Sāhars* and *Kumārila*. He flourished before 1150 A. D. and after 900 A. D. as he is quoted by Halādyūtha in his *Mīmāṃsā-sarvasva* and is himself later than *Vācaspati* mīśra.

gift of a person born a slave that is mentioned in the sixth¹ (chapter of the Pūrvamīmāṃsā), that is a questionable proposition, since, there being absence of ownership in his mother, she cannot be in the primary sense the subject of gift, acceptance or sale and therefore there is with greater reason the absence of that (ownership) in the person born of her as a slave. Let this digression pass.

Now (begins) heritage *Dāya* (heritage) means wealth that is not re-united and that is liable to be partitioned. *Asamvīṣṭa* (not re-united) is used (in the definition of *dāya*) for excluding (from *dāya*) wealth that is brought together into a common fund for the sake of profit and the like, since the expression *dāyabhāga* (partition of heritage) is not used to denote the division of wealth after it is lumped together by merchants (for trade). Similarly that wealth also which is brought together by the technical re-union that will be explained below (in the section on re-union) is excluded (from *dāya*). Therefore it is said in the *Smṛtisāṅgraha*:

Wealth which comes through the father and also that which comes through the mother are described by the word *dāya*; the partition of that (*dāya*) will now be expounded

And in the Nighaṇṭu (it is said)

The wise describe as *dāya* the father's wealth that is fit to be² divided

The word *pitr* (father) is used (in the above definition of *dāya*) as including all relatives whatever.³

1 In the sixth chapter of Jaimini's sūtra, or in the bhāṣya of S'abara thereon or in the Tantravārtika of Kumārila nothing is said about the *garbhadāsa* (the person born of a slave). Nilakantha is not probably referring to these original sources, but to some later works. The only place where this subject occurs in the 6th chapter of Jaimini is VI 7 6 where the conclusion is that a s'ūdra who, following the rules of smṛti (as in Manu I 91), serves persons of the three higher castes, cannot be given away by way of gift in the Viśvavajit sacrifice. What is meant by *garbhadāsa* is not quite clear. Nārada (abhyupetyās'us'rūsā 26-28) speaks of 15 *dāsas*, but the term *garbhadāsa* does not occur therein. Most probably his first variety *grhajūta* is the same as *garbhadāsa*. When a person keeps a concubine (*dāsī*) and a son is born of her, he may be styled *garbhadāsa*. But the person who keeps her has no power to make a gift of her or sell her and so the illegitimate son born of her cannot be given away by the putative father. Khandadeva in his comment on Jaimini VI 7. 6 does say that '*garbhadāsa* and the like may form the subject of gift in Viśvavajit'. But Khandadeva is later than Nilakantha, who is probably referring to some predecessor of Khandadeva holding similar views. Vide notes to V M pp 132-33.

2 If a person has on only son and then he dies, the wealth is not to be divided and yet it is *dāya*, as it is fit to be divided, though not actually divided. It is not clear what work is referred to as Nighaṇṭu. The passage from the *Smṛtisāṅgraha* is quoted in *Bar Parson* v *Bar Som* 36 Bom 424 at p 427 and is explained at p 433, where the Nighaṇṭu also is quoted.

3 The word *pitr* is used illustratively and stands for any person from whom property may be inherited on the ground of relationship.

This *dāya* is of two kinds *sapratibandha* (obstructed) and *apratibandha* (unobstructed). That is *sapratibandha* where the life of the owner of the wealth or that of his son and the like (i.e. grandson and great-grandson) is an obstacle (i.e. is interposed between the claimant and that wealth) for example the wealth of the paternal uncle and the like (as regards the nephew and the like) but where ownership accrues to sons and the like solely by relationship to the owner independently of any other means (source) of acquiring wealth that is *apratibandha dāya*, for example, the father's wealth. Here (ends the discourse on) the nature of *dāya*.

* Now (begins) the partition of that (i.e. of *dāya*) Nārada (p. 188 v. 1) describes it

Where a division of the ¹paternal wealth is arranged by the sons that is called by the wise *dāyabhāga* (partition of heritage) which is a title of law (out of the eighteen titles)

Putrah (by the sons) is indicative of (i.e. inclusive of) also grandsons and the like, *pitṛyaśya* (of the father) includes (that) of the grandfather and the like. Madana (the author of the *Madanaratna*) has the reading *pitṛyaddah* (for *pitṛyaśya*) itself (meaning wealth of the father and the like). Here is declared the character of the partition of heritage. Even in the absence of common (family) property a severance (of interest) does indeed take place also by a mere declaration in the form I am separate from thee for severance is merely a particular mode (or state) of the mind and this declaration only manifests that (mode of the mind²)

Now (about) the time of partition Manu says (IX. 104)

After (the death of) the father and the mother the brothers, having met together should divide equally the paternal (i.e. ancestral) wealth for while (the parents) are alive they (the brothers) have not power (over it)

Though this particle *ca* (and) is used (in the verse above) it is intended that the death (of both parents) should have taken place (before partition). Hence the *smṛtisangraha* (as quoted) in the *Madanaratna* says

1 Vide *Tammasalai v Marudai* I. L. R. 23 Bom. CCR at p. 611 for legal incidents of paternal wealth and self-acquired wealth. The verse of Nārada and remark of the *Mayūkhā* thereon are quoted in *Ponappa Pillai v Pappu ayyanga* I. L. R. 4 Mad. 1 (F.R.) at p. 47

2 This text declares that an unequivocal declaration of intention to separate effects the severance of a member from the joint family. Vide *Pratid v Varan* I. L. R. 40 I. A. p. 40. (=35 All. 80 at p. 87) for the same proposition. *Sowndararayan v Arunachalam* 53 Mad. 169 (F.R.) at p. 169 and *Girjabai v Sankar* 43 Cal. 1031 at p. 1016 (=43 I. A. 151 p. 160) in both of which this passage of the *Mayūkhā* is quoted. There are numerous cases on the question as to what constitutes an unequivocal declaration of intention to separate and as to the presumptions about the status of other members when one separates. Vide 43 I. A. 182, 19 Bom. L. R. 611 (=35 All. 496) 42 I. A. 285 and 168 50 I. A. 191, 50 Bom. 816 (=8 Bom. F. R. 1116) 51 I. A. 163 (=6 Lahore 91) 52 I. A. 83 (=48 Mad. 251)

Partition of paternal wealth may take place even when the mother is alive, since the mother in the absence of her lord (the father of the family) has no independent ownership. Similarly partition of the mother's wealth also takes place, while the father is alive, since the husband is not the lord of *strīdhana* (woman's peculiar property) when she has her issue living.

Brhaspati (p 369 v 1) states an exception¹ to this

On the death of both parents partition among brothers is propounded (in the texts), it (partition) is declared (i e permitted) even when both are living, if the mother is past child-bearing.

*Nārada (p 189 vv. 2-3) says

Hence after the (death of) the father the sons should divide equally the (father's) wealth, when the mother is past child-bearing and the sisters have been given away (in marriage), or when the father's sexual desires are extinguished or when the father's interest (in worldly) affairs) has ceased²

'Ramaṇa' means 'sexual desire', *uparatasprhah* means 'become indifferent to worldly affairs'. The clause *prattāsu bhaginīsu ca* (and when the sisters are given away) is (to be taken as) qualifying both *rajanivṛtti* (the cessation of menses in the case of the mother) and *ramananivṛtti* (cessation of sexual desire in the father) like (the pupil of) the crow's³ eye. Gautama (28 1-2) says 'After the (death of the) father, the sons may divide (paternal) wealth, or while the father is alive (they may partition) if the mother is past child-bearing or if he (the father) desires (to partition his property⁴).' By the word *icchati* (if he desires) it is

1 The exception is contained in the latter half of the verse quoted

2, This last half of the verse is variously read in the mss of the Mayūkhya and the other *nibandhas* (digests of Law) Vide notes to V M p 184

3 The popular belief is that the crow has but one eye, which it is supposed to move from one socket to the other as necessity requires. This maxim means that one word or clause, though occurring only once, may be connected with two clauses or serve two purposes. The idea in the above verses is that the proper time for partition is when the mother is past child-bearing or when the father has become indifferent to worldly affairs. *Prattāsu* &c does not lay down a third time for partition, but simply means that before partition takes place between brothers the sisters should have all been either married or provision should be made for their marriage.

4 This is the meaning according to the Mit. Haradatta the commentator of Gautama says ' though father be alive sons may partition if the mother is past child-bearing and if the father chooses to separate ' Telang J in his dissenting judgment in *Apaji v. Ramchandra* I L R 16 Bom 29 (F. B) says (at p 42) that this text of Gautama and that of Nārada (after the father's death &c) refer to self-acquired property. The Bombay Full Bench held that a son cannot in the life-time of his father sue his father and uncles for partition of his share in immoveable property and that decision was followed in *Jivabhar v Vadilal* 7 Bom L R 282. The other High Courts hold a view contrary to that of the majority in 16 Bom. 29. Vide 5 All 430 (F. B), 18 Mad. 179, 31 Cal. 120, 1 Patna 361.

* P. 95 (text),

declared that partition may take place at the choice of the father even if (the mother) be not past child bearing

Bṛhaspati (p 370 v 2) declares that partition may take place in some cases even against his (i e. the father's) desire

The father and sons are equal sharers in houses and lands that descend hereditarily (i e. from their ancestors) sons are not entitled to partition against the father's will of their father's (own) property¹

The meaning is that it follows as a matter of course that they (sons) can claim partition even against his (father's) will of what was acquired by their grandfather and the like² Even as regards the grandfather's property Manu (9 209) and Viṣṇu (Dh S 18. 43) declare that partition takes place in some cases only at the pleasure of the father

If a father recovers the property of his father which the latter could not recover he (the father) if unwilling will not have to divide it with his sons, (since) it is his self-acquisition

* Bṛhaspati (pp 371-72 vv 12-13) says

Over the property of the grandfather seized (by strangers) which was recovered by the father through his own power and over what was acquired by him by his own learning bravery or the like, the father's ownership has been declared (in the smṛitis) From that wealth he may make a gift or he may enjoy it at his pleasure.

Nārada (p 198 v 16) says —

A father who is afflicted with disease, who is under (the influence of) wrath, whose mind is addicted to sexual desires who acts contrary to what the *śāstra* ordains has no power to make a partition (at his own will)

Hārta says³ —

Even when the father does not desire 'it partition of *rikṣa* (ances-

1 There is great divergence between the Mlt and the Dāyabhāga about the times for partition. The school of the former gives four times for partition while (1) father is alive at his will, this is (Yāj. II 114) 2 during father's life when mother is past child bearing or father is indifferent to the world sons may partition even against father's will (in Nārada's word above) 3 in father's life when he is *patita* or quite infirm through old age or suffers from incurable disease (vide Hārta quoted below) 4 after the father's death (Yāj. II 117) The Dāyabhāga specifies only two times: (1) when his ownership ceases owing to his being *patita* or indifferent to the world or when he dies and (2) when though living he desires to divide his wealth

2. In *Jatāvat* v 1 adit 17 Bom. L. R. 232 at p 235 and *Kaṭiparashad* v *Jam karan* 1 All 130 (F.B.) at p. 161 this text of Bṛhaspati and the Mayūkha's remarks thereon are quoted.

3. This is ascribed to S'aukha by the Mlt. Aparārka Parāśara Mādhyama and other works

4. Mandlik translates if the father be free from desire old &c. But this is wrong as Nīlakaṇṭha's quotation from Mādhavarūpa and remarks thereafter show
P 96 (text).

order to be) take place, if he be old, or perverted mind, or suffers from any incurable disease.

According to the Mitakshaya *śāstram* means 'when he has no desire to partition'. *Uparistadāh* means 'who is poor'. *adharmā* (what is forbidden by *śāstra*). The *śāstra* of Hārīśa *śāstra* in such cases a partition may take place even if the father does not desire it.

Hārīśa declares that a partition may take place with the consent of the eldest son when the father is incapable (of managing family affairs). 'Indeed when (the father) is weak (through old age), has gone to a distant land or is afflicted (with deep poverty or disease), the eldest son may look after the affairs (of the family)'. Śaṅkha and Lalhita say 'when the father is incapable, the eldest (son) should transact the affairs of the family or with his consent, he who is younger than him, if he be conversant with (family) affairs'. *Anantarat* means 'one born after him'. The quinterference (of the discussion) is that partition should take place with the consent of him who is able to maintain the family, but that where all are so able, then there is no restriction.

Yājñavalkya (II. 111) says —

If the father makes a partition he may separate his sons (from himself and among themselves) at his will, giving the eldest the best share or all may be equal sharers¹

*The latter half of the verse only explains the voluntary partition (contained in the first half),² since, when it is possible for the (father's) will to resort to the two alternatives (mentioned in the latter half), it would not be proper that it should be unfettered, for otherwise (i.e. if the father's will were not restricted to either of two alternatives) there would be (the

1. This text and the Mit. thereon are quoted in *Jalshman Dada Nani v. Ramchandra Dada Nani* 1 Bom. 561 at p. 568, vide also the same case when it went up to the Privy Council, L. R. 7 I. A. p. 181, vide also *Dapu v. Shankar* 28 Bom. L. R. p. 46 (where it was held, after quoting this verse of Yāj., that a father can effect during his life a partition among his minor sons *inter se*, *Kandasami v. Dorasami* 2 Mad. 817 at p. 322 (where the *Mayūkhā* is referred to and it is said that a father can in his last illness separate by a document his major and minor sons without consulting their wishes), *Nirman Bahadur v. Fatch Bahadur* 52 All. 178.

2. According to the Mit. the father's will may be exercised in two ways only viz. by giving the best share to the eldest (as said in Manu 2. 112) or by giving equal shares to all sons. The Mit. then points out that the first alternative applies only to self-acquired property and the second to ancestral property. The *Dāyabhāga* on the other hand applies the first half to self-acquired property and leaves the father unfettered discretion to give anything to any son or to give nothing to any son and the second half to ancestral property.

* E. 97 (text)

fault of) the splitting up of a *vākya*¹ (i.e. sentence) and there would follow the fault of uncertainty in that (the father may give) to one son a *lakṣ* (of rupees) to another a *coturee* and nothing to a third.

Manu (9 112 116-117) speaks of a special provision as regards the separation of the eldest (brother)

The deduction (from the whole family property) made in favour of the eldest is a twentieth part (of the heritage) besides what is best of all the chattels (of the family), for the middle (brother) it is one-half of that (i.e. it is one-fortieth) and for the youngest it is half of the latter (i.e. one-eightieth of the whole). But if the deduction for these be not made the following shall be the apportionment of shares. The eldest son should take one share in excess (i.e. a double share) the one born next (after the eldest) a share and a half and the younger sons a share each. This is the settled rule of law.

Manu (9 126) declares that out of twin brothers he who is born first has seniority

In the *subrahmaṇya*² formula also the invocation (of Indra) is declared (in the *śāstras*) to be made by him who is senior in birth; and in naming (or calling) twins seniority is deemed *vyavahārika* to the (priority of actual) birth. Among* twins *seniority* is established in him whose face on birth is seen first by his parents and kinsmen.

As to what is said in the medical works like the *Piṇḍasiddhi* that seniority (among twins) belongs to him who is born last, that (opinion of medical works) is set aside by this (i.e. passage of Manu) so far as things to be

1. *Vākya*bhedha is a fault according to the *Mīmāṃsā*. The rule is that in a single *vākya* there is to be a single *vāda* and so if in a single *vākya* there are two *vāda*s that is a fault. Vide notes to V. M. p. 180 for greater details. If it were held that the first half (of Yā. II 114) relates to father's self-acquisition and the latter to ancestral property there would be two *vāda*s (injunctions) in the same *vākya* which is not allowable. Therefore the first half contains the rule and the second half contains an explanation or simplification of it. Mandlik's translation (p. 41) also because such a construction will involve the difficulty of three predicates is neither accurate nor clear.

2. The *Subrahmaṇya* is a loud invocation addressed to Indra in the *Jyotiṣoma* to be recited by the *Idārcarya* or according to some by the *Subrahmaṇya* priest an assistant of the *Udgātrya*. According to the *Āṭyāyanaśrautasūtra* (I 8. 1 ff) in this invocation the names of the three paternal ancestors of the *gajavāṇa* are to be recited and also of his descendants for three generations according to their seniority in birth. Vide notes to IV M. pp. 140-141 for further details.

3. This text is not found in Manu but is ascribed to Deva in the *Yajñadātaka*.

accomplished are concerned¹, since it has no Vedic basis, just as in the case of such passages as 'a man becomes a sūdra at the end of a month' (if, he does this or that forbidden act) As to the passage of the *Bhāgavata*², 'then there are two fetuses and birth takes place in the order opposite to that of conception', whereby (among twins) the one born last is declared to have seniority, that also is set aside by these texts, since in the purāṇas many practices opposed to the smṛtis are met with³. Some say that the question (when there is a conflict between smṛti and ācāra) should be settled in accordance with the usage of each country; but what is stated above is alone proper. This partition after a deduction is not desirable in this *kali-yuga* (the present age) since it is enumerated (in the ancient texts) among those things that are prohibited in the Kali age. And this has been (discussed and) settled by me in the *Samayamayūkha*⁴.

Nārada (p. 191 v. 12) declares that the father gets two shares:

A father making a partition may reserve two shares for himself⁵.

But this relates to one having an only son; for in the *Madanaratna* occurs the following *dīṭum* of S'āṅkha-Lakṣita 'if he has an only son, he

1. The words in the original are 'kāryāṁs'o bādhyate'. Whatever foundation there may be for the theory of medicine so far as actual facts (*siddha* matters) are concerned they have no Vedic support, while the other theory that among twins seniority is by birth has Vedic sanction in the Subrahmanyā formula and in Manu. Therefore where Vedic or *smṛti* rites are to be performed (*kārya* = *sādhya*) for securing unseen results (*adṛṣṭa*) the theory of Manu has to be followed and the medical theory may be followed in medicine. The words 'just as &c.' illustrate 'kāryāṁs'o bādha'. Vasiṣṭha Dh. S. II 27 and Manu X 92 say that a *brāhmana*, if he sells milk becomes a *Sūdra* after three days. This does not mean that so far as things prescribed by the Vedas to be performed by persons born *brāhmanas* he ceases to be a *brāhmana* (i. e. so far as *kārya* i. e. matters to be done in future are concerned he is still a *brāhmana* and not a *sūdra*). So that sentence simply censures a *brāhmaṇa*, but leaves his status as to future actions (*kāryāṁs'a*) unaffected. Mandlik translates (p. 42) 'that is set aside by the above texts in the matter now under discussion' is not correct, nor is his reading 'he becomes purified after a month' acceptable. Vide notes to V. M. p. 142 for detailed reasons.

2. These words do not occur in the *Bhāgavatapurāṇa* but in the comment of S'rīdhara on *Bhāgavata* III 17-18, who quotes the passage from *Puṇḍarīkāsūtra*, about the seniority between *Hiranyakāśipu* and *Hiranyākṣa*. It is to be noted that Kamalākara, a first cousin of Nilakantha, in his *Nirnayasindhu* quotes this very passage in the same way as from the *Bhāgavata* and holds the same opinion. This is probably due to the fact that both were taught together and learnt this from the same teacher.

3. The principle is that each of *s'ruti*, *smṛti* and *ācāra* is to be set aside if in conflict with the proceeding. Vide *Mit* on *Yāj* I 7.

4. The last section of the author's *Samayamayūkha* deals at length with the topic of things forbidden in the *Kali* age. In *Damodardas v. Uttamram* 17 Bom. 271 it was held that the eldest brother was entitled to take the family idol and keep it with the property appertaining thereto.

5. According to the *Mit* and the *Vir.* this text applies to self-acquired property,

* P. 98 (text)

may reserve two shares for himself In the Pārijāta¹ it is said ' the word ' *eka* ' (in Śāṅkha-Likhita) denotes the best as Amara says that the word *eka* is employed in the sense of the foremost ' another and only and therefore the meaning (of *ekaputra* in Śāṅkha Likhita) is if he has a son possessed of good qualities.

Bṛhaspati (p. 370 v 3) declares that as regards wealth acquired by the grandfather (the father) is entitled only to an equal share even with an only son *

In wealth acquired by the grandfather, whether moveable or immoveable father and son are declared to be takers of an equal share.

Yājñavalkya (II. 121) says

In land &c. (translated above p 78)

Kātyāyana says

When the fathers and the brothers take in equal shares all the wealth whatever (that the family owns) that is said to be a righteous partition.

*As for the text of Yājñavalkya (II 116) *

A partition made by the father among (sons) separated by giving them greater or smaller shares if according to dharmaśāstra, is valid

Madana, Viṣṇūśekhara and others say that it means that if (the partition) made by the father be according to dharma (i e dharmaśāstra) it cannot be set aside As to the text of Nārada (p. 192 v 15)

To those that were separated by the father himself with equal lesser or greater (shares of) wealth that (partition) alone is lawful since the father is the lord of all

That text relates to another (i e a former) yuga

In the case of the allotment of equal shares to himself (i e to the father) and his sons Yājñavalkya (II 116) declares a share for the wife also.

If he makes the shares (of himself and his sons) equal, his wives to whom no stridhana was given by their husband (i e by himself) or their father-in-law should be made partakers of an equal share

1 There are several works called Pārijāta. The Vivādhavākya (p. 400) quotes this very view from Pārijāta. Therefore the work must be earlier than 1800 A D It appears from the Vir (p. 606) that it is the Vyavahārikapārijāta that is referred to by Nīlakanṭha. For the various interpretations of this śāstra vide notes to V M pp. 143-144

2. This verse of Bṛhaspati is quoted in Jagadānanda v Sir Māngalādas 10 Bom 529 at p 517 and it was said that there was no distinction between moveable and immoveable property as regards the son's right to demand partition

3. This verse literally means a partition if made by the father giving smaller or greater shares (to his sons) is valid The Mit. interprets it by introducing certain words, which the Mayūkha also introduces. The Dīyabhī takes the literal meaning and allows the father to make an unequal distribution of his self-acquired or ancestral property *Dīyabhī* according to the Mit. minus allowed by the śāstra and restricts only to the deduction allowed by Manu to the eldest.

But if (*strīdhana*) has been given, one half (of a share) should be given (to the wife or wives), since there is a text (*Yājñavalkya* II 148) 'but if (*strīdhana*) has been given, one should allot half' ¹. *Ardham* means 'as much as would, together with the *strīdhana* already given, be equal to the share of a son'. But no share (should be allotted) to that (wife) whose (*strīdhana*) wealth is already in excess of the share (that might justly be hers).

The same author (*Yājñavalkya* II. 116) speaks of the absence of a desire to take a share of the heritage on the part of a son who is able to earn and who does not covet (a share) .

The* separation of one who is able (to earn wealth) and who does not desire (a share in ancestral wealth) should be effected by giving a trifle

In the *Mitākṣarā* it is said that the giving of a trifle is (prescribed) for the purpose of preventing his sons from claiming (later on) a share in the heritage ²

In another *smṛti* (*Yāj* II 117) the allotment of equal shares at a partition after the death of the father is declared . ³

The sons (i e the brothers) should, after the death of the parents, divide equally the paternal wealth and the debts

Hārīta says ' when the father is dead, the partition of *rikṭha* (paternal wealth) is equal '

Yājñavalkya (II 123) says *

When the sons divide after the death of the father, the mother also should receive an equal share

1 This is said with reference to the giving of *ūdhivedanika* *strīdhana* to a wife when she is superseded by the husband's marrying another woman *Ardha* means a portion not an exact half In *Jairam v Nathu* 31 Bom 54 (it was held in a suit by a Hindu against his father and brothers that the step-mother was entitled to a share equal to that of a son but that from her share must be deducted the value of the *strīdhana* received by, her from her 'father-in-law or husband) Vide also *Hosbanna v Devanna* 48 Bom 468 and *Hushensab v Basappa* 34 Bom L R 1325 where, after referring to the *Mayūkha*, it is said that the mother is entitled to a share on a partition during the father's life-time as well as after his death

2 Vide *Fakirappa v Yellappa* 22 Bom 101 (where after a 'grandson separated from his grandfather and uncles the grandfather died leaving self-acquired property, it was held that the sons who remained 'joint with the deceased were entitled to the whole of the self-acquired property and that the separated grandson could take nothing.)

3 This remark and the verse of *Yāj* (II 117) and the text of *Hārīta* are referred to in *Patil Hari v Hakamchand* I L R 10 Bom 363 at p 366

4 These words (of *Yāj* (II 123) are quoted in *Beti Kunwar v Janki Kunwar* 33 All 118 at p 121 and it is said ' this in our opinion implies an *actual division* of the family property i e a complete partition under which there is a division of interests as well as separate possession We do not think that a *mere severance* of interest confers on the mother a right to a share equal to that of each of the sons'. Vide 50 All. 532 'at p. 534 for criticism of *Olebrooke's* translation of this verse

* P, 100 (text).

Vyāsa (Dh 8 18-84) says mothers are entitled to shares in accordance with the shares taken by their sons. In another *śūtra* (it is said)

The mother who has no (*stridhana*) wealth (of her own) should take on a partition a share along with the sons

The meaning is that a mother who is possessed of (*stridhana*) wealth should receive only so much as will bring up her wealth (*stridhana*) to an equality with the son's share¹, while (a mother) whose (*stridhana*) wealth exceeds the share (of a son) will not be entitled to a share

Vyāsa speaks of a share (being given) to the step-mother and the paternal² grand mother

The sonless wives of the father are declared equal sharers and so also the paternal grandmothers, all of them are declared to be equal to the mother³

By the word *sarvāḥ* (all) the co-wives of the paternal grandmother also are included

Yājñavalkya (II 123) describes the mode of partition among the sons of several brothers

Among persons (claiming) through different fathers the assignment of shares is according to the fathers

The meaning is that, where (for example) one (father) has a single son, another has two and a third has three the division (among these six cousins) takes place by (reference to) the fathers only and not by

1 This remark is referred to in *Sarvabhai v. Lazmabai* 1 L. R. 2 Bom 578 (F. R.) at p. 581 (where it is said that a woman's *stridhana* is to be taken into account in awarding maintenance to her)

2 This text of Vyāsa and the two verses of Yāj. quoted above (II 115 and 123) were elaborately discussed in the recent Bombay case *Jamnabai v. Vasudeo* 33 Bom L. R. 48 (= 54 Bom 417) where following *Shree Narayana v. Janki Prasad* 81 All 505 (F. B.) at p. 509 it was held that in a partition between a Hindu father (governed by the Mitāksharā) and his son, the grandmother (i. e. the father's mother) is not entitled to a share and that the text of Vyāsa might entitle the grandmother or step-grand mother to a share when there was a partition between her grandsons (as was held in *Tithal Ramkrishna v. Pralhad Ramkrishna* 1 L. R. 30 Bom. 573 at p. 581 = 17 Bom. L. R. 301 and in *Kandhalal v. Gauri* 47 All. 127) or between collaterals of different degrees as in *Nabuna Kunkar v. Jugal Narain* 50 All 632 (where the grandmother was given a share when the partition was between her son and a grandson or another son) or in *Suryam v. Harikaran* 2 Patna 739. In *Krishna Lal Jha v. Nandeshwar Jha* 4 Patna L. J. p. 30 the Court relying on the interpretation of Vyāsa's text given in the V. R. and V. C. dissented from 81 All 505 (F. B.). Vide also 8 Cal 612 and 81 Cal. 1233f and in support of Vyāsa's text with difference from the recent Bombay ruling *Vijai Bai v. Bai* 431 a p. 531 and 573 (F. B.) at p. 541 and 17 Bom 371 at pp. 235-237 for quota of Vyāsa as to the share of the mother

*(reference to) the number of the sharers¹ Kātyāyana says.

If an undivided younger brother dies, he (the elder) should make the son of the former a partaker of the riktha (ancestral wealth), when he has not obtained livelihood (share of the heritage) from his paternal grandfather. But he should obtain from his paternal uncle or from the paternal uncle's son the share of his father (i.e. the share that would have been his deceased father's if alive). That very share (i.e. a similar or equal share) would be according to law the share of all the brothers. Or even his son would receive a share, beyond that² (i.e. the great-grand-son) there is cessation (of the right to share in ancestral wealth).

The word *anuja* (younger brother) is illustrative and includes even the elder brother. *Paratah* (beyond) means '(beyond) the great-grand-son.' The son and the like of the great-grandson do not obtain the wealth (of the great-great-grand-father) when the father, the grand-father and the great-grand father die (first) and then the great-great-grand-father dies and the latter's sons and the like are alive, if no son, no grandson, nor great-grandson whatever exist, even he (the great-great-grandson) does take (the inheritance), this is the meaning. This (text of Kātyāyana) does not refer to the undivided (coparceners) but to those that are re-united,³ since Devala says:-

1 That is the division is *per stirpes* and not *per capita*. In *Manjanath v. Narayana* 5 Mad 362 at p 364 it is said that the rule about division *per stirpes* is laid down with reference to cases in which all the coparceners desire partition at the same time and that it ought not to be applied indiscriminately to cases of partial partition. In *Nagesh v. Gururao* 17 Bom 303 Telang J says that succession *per stirpes* is a special rule in partition based on a special text and that inheritance among remoter Gotraja sapindas goes *per capita* and not *per stirpes*. Vide *Narasappa v. Bharmappa* 45 Bom. 296 (where first cousins were held entitled to take *per capita* and not *per stirpes*) and *Kallava v. Vithabar* 32 Bom. L R 295 (where it was held that widows of gotraja sapindas inherit *per capita* and not *per stirpes*).

2 This means 'the son of the grandson of the man whose wealth is to be divided'. The idea is that the son of the great-grandson is not entitled to a share on partition when the *propositus* dies leaving a son, grandson or great-grandson. Vide notes to V. M. pp 147-148 and Kātyāyana vv 855-856. These verses are lucidly explained in *Mono v. Ganesh* 10 Bom H C R 444 (at pp 461, 466-67) and are quoted in *Debi Prasad v. Thakur* 1 All 105 (F B) at p 111.

3 Why Nilakantha takes this passage in this sense it is difficult to say. Kātyāyana starts with the words 'when a younger brother dies undivided' and there is nothing to show that the topic has changed to that of reunion. Probably Nilakantha thus construes in order to harmonise his meaning of Devala's verse with Kātyāyana's. Devala uses the words 'again' and 'up to the fourth', which correspond with 'beyond that there is cessation'. Nilakantha's interpretation of Devala is forced and irrelevant. Vide notes to V. M. p 148. This is a forced construction of the word *aribhakta-vibhakṭānām*. It should be taken as a *dvandva* meaning 'of those who are undivided and those who are divided' and not as a *karmadhāraya* as Nilakantha seems to have done.

* P. 101 (text),

Among members of the same family who being once undivided became divided and then began to live together (i.e. reunited) there may be partition again up to the fourth in descent (including the propositus), this is the established rule

If a debt a document, a house a field be the property of a person's grandfather he though he may have gone abroad for a long time is entitled to a share in it when he returns. If a person leaves the country common to his family (and himself) and resorts to another country there is no doubt that a share must be given to his descendant when he returns (Bṛhaspati p. 878 vv. 28-24).

* *Avibhaktavibhaktāṇām* (in Devala) means 'the great-great-grandfather and his sons who are reunited'. This (text of Devala) refers to those who live in the same country. A fifth in descent and the like also do take (a share in the heritage) when they live in another country since the *smṛiti* of Bṛhaspati (p. 873 v. 25) when treating of residence in a foreign country says

Even he who is third or fifth or seventh (from the propositus) may receive his share descending hereditarily on his birth and family name being ascertained

Bṛhaspati (p. 872 v. 15) speaks of a partition according to mothers in some cases

If there be many (sons) sprung from the same (father) who are equal in caste and number they may make an account of their being born of rival mothers a legal partition according to the mothers.¹

Vyāsa says

If there be sons who are sprung from one (father) who are equal in caste and number but have different mothers a division according to mothers is commended

Bṛhaspati (p. 372 v. 16) cites an example opposite of this

Among (sons) who are of the same *varṇa* (class) but differ in number (i.e. a different number of sons is born to each wife) a division according to the males (entitled to share) is commended

Yājñavalkya (II 125) speaks of partition among sons of (mothers of) different castes

The sons of a brāhmaṇa get respectively four shares three, two and one those born of a kṣatriya get three two and one while those

1. This explanation should really have come before the verses. If a debt &c

2. When the sons are of the same caste and equal in number though born of different mothers, no difference will result as to the share of each son whether there be a division with reference to the mothers or without. But the text speaks of division through mothers here simply to give prominence to them.

born of a Vais'ya two shares and one respectively ¹

**Brāhmanātmaṣāh* means 'born (to a brāhmana) of (wives of the) brāhmana, ksatriya, vais'ya and s'ūdra castes', *ksatrayāh* means 'born (to a ksatriya) of wives of the ksatriya, vais'ya and s'ūdra castes', and *vidyāh* means 'born of wives of the vais'ya and s'ūdra castes'

Brhaspati (p 374 v 30) says

Land obtained by the acceptance (of a gift) should not be given to the son of a wife of the ksatriya or other (inferior) caste. Even if their father give it to them, the son of the wife of the brāhmana caste should resume it on the death (of the brāhmana father)

Devala says

A son begotten on a wife of the s'ūdra caste by a person of the (three) regenerate castes is not entitled to a share of land; but one born on a wife of the same caste (as that of the father) would get all (including land); this is the settled law ²

Bhūmeh means ' (of land) though acquired even by purchase and the other modes', but of chattels he (son begotten on a s'ūdra wife by a man of the regenerate classes) does get a share. The son, however, born of a s'ūdra woman not married (to the putative father) does not obtain a share even of chattels. And likewise Manu (9 155) says

The son of a brāhmana, ksatriya and vais'ya from a s'ūdra woman is not entitled to (a share of) the heritage, whatever wealth his father may give him, so much alone belongs to him

Brhaspati³ (p 374 v. 31) lays down a special rule after the death of the father;

An obedient and meritorious son born from a woman of the s'ūdra caste to a man who has no other child should get maintenance, the sapindas (of the deceased) should get the rest in equal shares

1 According to Manu III 13 a brāhmana could marry a woman of his own caste or of any one of the other and lower three *varnas* and so on with the ksatriya and the rest. In *Rahi v Govind* 1 Bom 97 at p 112 this text of Yāj and the explanation of the Mayūkha are referred to and it is said that the marriage by the higher castes of girls of lower castes is a luxury forbidden to the twice-born classes since the Kaliyuga commenced and that 'this is one of many instances in which comparatively modern writers on Hindu Law discussed, with as much zest as if it were living law, doctrines which in the lapse of time had become obsolete'. But in *Bar Gulab v Jvanlal* 46 Bom 871 this passage of the Mayūkha (at p 881) is relied upon as one reason for holding *pratiloma* marriages valid in modern times. In *Natha v Chotalal* 32 Bom L R 1348 the marriage of a brāhmana with a s'ūdra female was held to be valid and the son born of such an union was declared entitled to inherit $\frac{1}{10}$ th of the estate of his father as well as his uncle. Vide notes to Kātyāyana vv 863-864 for a brief criticism of this last case.

2 In *Rahi v. Govind* I. L R 1 Bom 97 it said at pp 106 and 112 that Devala's text refers to s'ūdra women who are married to men of higher castes

3 This text of Brhaspati and the following one of Gautama are referred to in 7 Mad. 407 at p. 412 and in *Rajannath v Nitai* 48 Cal. 643 (F B.) at p. 686 (also translated)

* P. 108 (text).

Gautama (28-37) says even the son of a sūdra woman¹ born to a man who has no other child gets if obedient provision for his maintenance. *Vṛttimūlam* means source of livelihood. The same author (Gautama Dh. S. 28-48) says sons born in the reverse order (i. e. born of a woman of higher caste from a man of lower castes) are treated like the son begotten on a sūdra woman (by a member of the three higher castes). *Pratilomāḥ* are persons born of women who are of higher castes as compared with the caste of the begetter.

Yājñavalkya¹ (II 193-194) states a special rule as regards one who is begotten by a sūdra on a woman (of the same caste) not married to him

1. These verses of Yāj. have been the subject of numerous decisions in all the Indian High Courts. In *Rahi v Gorind* 1 Bom. 97 these verses are translated (at p. 102) and it is said that the dāsuputra is entitled to half the share of a legitimate son; that if there be no legitimate son or legitimate daughter or son of such daughter the dāsuputra takes the whole estate and that if there be a legitimate daughter or such daughter's son the illegitimate son would take only half the share of a legitimate son and such daughter or daughter's son would take the residue. Yāj. does not mention the widow and the court thought in 1 Bom. 97 that she was excluded (being only entitled to maintenance) when in competition with the dāsuputra along with the legitimate daughter or her son. In *Sada v Daira* 4 Bom. 87 (F. B.) it was decided that a legitimate son and an illegitimate son of a sūdra could form a coparcenary and that if the legitimate son died, then the illegitimate son would succeed to the whole of the coparcenary property even though the widow and daughter of the sūdra father were living. In *Raja Jogendra Dhwaji v Naganand* L. R. 17 I. A. p. 128 the decision in 4 Bom. 87 that the legitimate son and illegitimate son of a sūdra can form a coparcenary and that the latter would by survivorship take the whole property was approved as to an impartible ray. Vide also *Pilla pappa v Natarajan* 53 Bom. L. R. 1620 (F. C.). There was an *obiter dictum* in 4 Bom. at p. 52 that if a sūdra died leaving only a widow daughter and dāsuputra, the latter would take $\frac{1}{2}$, the daughter $\frac{1}{2}$ and the widow would be entitled to maintenance only and that this was one of the arbitrary arrangements which are not uncommon in *Mudra Law* (p. 50). But in *Shankari v Girara* 14 Bom. 282 and *Ambabai v Gorind* 23 Bom. 247 at p. 265 this remark about the exclusion of the widow of a sūdra when an illegitimate son exists is doubted. In *Mercadasi Amai v Appalatti* 83 Mad. 225 it is said that the illegitimate son of a separated childless sūdra would succeed as co-heir with the latter's widow daughter or daughter's son. In L. R. 50 I. A. p. 32 (= 46 Mad. 167 = 25 Bom. L. R. 577) it was held that whereas a sūdra died leaving his widow and an illegitimate son each took one-half of the estate. Another important matter is the meaning of the word dā. The Bombay decisions have held that dā is not to be taken in the strict literal sense (a female slave) but means a woman kept as a concubine, the connection being continuous and lawful. It must be shown that the connection between the sūdra man and the woman was not incestuous or adulterous in order that the illegitimate son might inherit. Vide *Rahi v Gorind* 1 Bom. 97 at p. 110, *Sada v Daira* 4 Bom. 87 (F. B.) at p. 41 *Vukatai v Landu* 39 Bom. L. R. 595 (where the son of a married woman from a sūdra was held not to be a dāsuputra capable of inheriting even though the husband of the woman convicted at the connection). Vide 83 Mad. 156 (F. B.) for an elaborate examination of this question particularly at pp. 152-157. In that case the son of a woman who was at one time a dancing woman and followed the profession of a prostitute and who subsequently became a

*Even a son begotten by a s'ūdra on a dāsī (a concubine) may partake of a share at the choice (of his father) But, when the father is dead, the brothers should make him the recipient of a half share

Kāmah means 'the desire (or choice) of the father' On account of the word s'ūd. ena (by a s'ūdra) it follows that one who is begotten on a dāsī by (a member of) the regenerate classes is not entitled to a share even at the father's choice, nor to a half share after the father's death nor to the whole in the absence of (legitimate) son and the like This is according to the Madanaratna and others.

Gautama (Dh S 28. 27) states a special rule about a son born after a partition has taken place ' the son born after partition takes only his father's

concubine in the exclusive keeping of a s'ūdra was held entitled to get his proper share in joint family property It was observed in that case at p 151 that the limitation as to the woman being in the exclusive and continuous keeping of the man was not to be found in the texts but was imposed by the courts, just as the further restriction that the connection must not have been incestuous or adulterous was imposed on general grounds of morality The latest case is *Tukaram v Dinhar* 33 Bom L R 289, where it was held that even though the concubine be a widow or even if the connection in its inception be adulterous it did not matter, provided the illegitimate son was born at a time when the connection had ceased to be adulterous It is not necessary in order to entitle a dāsīputra to inherit to a s'ūdra that a marriage could have taken place between the putative father and the mother according to the custom of the mother's caste (vide 9 Mad 186 F B.) The illegitimate son, of a Hindu by a Mahomedan mistress was not held entitled to succeed to the property of the deceased (vide *Sitaram v Ganpat* 25 Bom L R 429 following 27 Mad 13). In Calcutta the earlier cases (1 Cal 1, 13 Cal 91, 23 Cal 191) held that dāsī meant a female slave and as slavery was abolished in British India there could be no dāsīputra properly so called and that that word cannot mean the son of a kept woman or a continuous concubine. But a Full Bench decision in *Rajannath Das v Nitar Chandra* 48 Cal 643 (F B) holds that the Bombay view of the meaning of dāsīputra is the correct one and has overruled the earlier Calcutta cases It has been held that a dāsīputra does not succeed collaterally in his putative father's family (vide 25 Mad 429, 44 Bom 185) nor do the descendants of the father succeed collaterally to the dāsīputra (46 Bom 424). In *Bhikya v Vedu* 32 Bom 562 it was held that dāsīputra does not include the illegitimate daughter of a s'ūdra (vide also 50 Mad 340 at pp 345 and 350) There is divergence of opinion as to what is meant by ' recipient of half a share ' In *Chellammal v Ranganathan* 34 Mad 277 it was held that the half share is half of what the legitimate son actually takes and that where there were 4 illegitimate sons and 3 legitimate sons, each of the former took $\frac{1}{10}$ and each of the latter $\frac{2}{10}$ ths In *Ganqabar v.*

Bandu 40 Bom 369 it was held following 34 Mad 277 that where a s'ūdra died leaving a legitimate daughter and an illegitimate son, the former took $\frac{2}{3}$ and the latter $\frac{1}{3}$ of the whole estate But in *Kamulammal v Visuanathaswami* 50 I A p 32 (= 46 Mad 167 = 25 Bom L R 577) the Privy Council held that the Bombay view in 40 Bom 369 was not based on texts and commentaries, but on case law and that if a s'ūdra died leaving a widow and an illegitimate son each would take a half of the estate, as the illegitimate son is to take half of what he would have taken if he were a legitimate son. Vide 48 Mad. 1 at p 226 for the same proposition.

(share) Bṛhaspati¹ (pp 372-373 vv 19-20) also says —

Whatever a father who has separated from his sons himself acquires, all that belongs to the son born after partition those born before (partition) are declared to have no right (to it) As with wealth so with regard to debts gifts pledges and sales they (i.e. father and separated son) are independent of each other excepting impurity (on death etc.) and the offering of libations of water (to the dead)

But if² there be only debts (and no property left by the separated father) he (i.e. the son born after partition) should not at all pay (his father's) debts unless he secures a share (of property) from those (his brothers) who separated before (his birth) since it will be stated (later on) one who receives *rikṣā* (ancestral wealth) should be made to pay the debt (Yāj II 51) If (the father) be re-united (after partition) with some one (out of the sons separated from him) then (the son born after partition) divides (his father's wealth) with him (the son re-united) since Manu (9 216) says —

The son³ born after partition is entitled only to the property of his father or he should divide it with those who might have become re-united with him (the father)

*Yājñavalkya (II 122) makes special provision for the case where the mother a step-mother or a brother's wife was pregnant at the time of partition after the father's death but the fact was not evident (at the time of partition) and a son was born afterwards

After⁴ the sons have separated if a son be born (to the deceased father) from a wife of the same class he is entitled to a (fresh) partition (with the already separated sons).

And the partition is to be so made by all the brothers and the rest contributing a little out of their respective shares that the share (of the after-born son) will be equal to that of each of them Manu (Dh S 17 3) says

1 The first verse of Bṛhaspati is quoted in *Narad Smṛti* v 148 and *Smṛti* 4 All. 427 at p. 423

2 Mandlik's translation (p. 47) the previously separated son is not at all bound to pay debts without receiving a share of the heritage is entirely wrong.

3 This verse is quoted in 4 All. 427 at p. 423

4 The *Mayūkhya* applies this verse to a case where the father having died and the mother's or step-mother's pregnancy being not known the sons separate and then a son is born. The *Mit.* applies it to a partition during father's life time when the mother's pregnancy was not known and then the father died and a posthumous son was born. The *Mayūkhya* follows the *Śmṛtikāṇḍikā* and the *Nīlakaṇṭha*. If the son were born from a wife of another class, he would take 2/3 proper share from wealth left by the father. In *Qanvaṭi* v 6 par 23 Rom. 536 at p. 613 it is said that somewhat vague texts of Yajñu and Yājñavalkya which direct separated brothers to give a share to an after-born son apply to sons who have no provision made for them and have further been explained by commentators as applicable only to the case of posthumous sons

'those who separated from their father should give a share to the son born after partition'. And this rule of Visnu must be understood to be applicable to the shares after taking into consideration the outgoings (the expenditure) and incomings (the accretions or profits¹). In case of existence of these (expenditure and accretions) the same author (Yāj II. 122) says —

The allotment of a share to him (to the after-born son) should be made out of (the estate) existing as correctly found after allowing for income (accretions) and expenditure

Drs'yāt (from the visible wealth) means 'out of the property that exists'

Vasistha (Dh S 17. 40--41) speaks of a special matter at the time of partition among brothers 'Now (begins) the partition of heritage among the brothers (They should wait) until those women (patently pregnant wives of their brothers) who have no issue are delivered of sons'. The words 'waiting should be observed' are to be understood (after the sūtra of Vasistha)

Brhaspati (p 373 v 21) lays down a special rule about partition after the father's death

If there be younger brothers whose purificatory ceremonies have not (all) been performed, then purificatory ceremonies must be performed by the elder brother himself out of the common paternal wealth

The form *yavīyasah*² (younger) wherein *num* (i. e. m after the penultimate vowel) and the long ā are absent is irregular after the manner of Vedic usage. The mention of the word *hrātī* in (Brhaspati's text) is illustrative and includes sisters. And the same author³ says

*And those daughters (of the deceased father) whose (marriage) ceremonies have not been (already) performed should have their (marriage)

1 That is, proper expenditure made from their shares by each of the brothers is to be deducted. The translation of Mandlik (p 48) 'this has reference to shares neither increased nor diminished by profit or loss' is wrong, particularly as he reads '*rekasekasahteṣu*' and not -- '*rahteṣu*'. Visnu made no reference to the deduction of expenditure and the addition of profits. Therefore the Mayūkha had to say 'this rule must be understood' &c while Yāj is explicit about them and so the Mayūkha says '*tatsatve tu* &c'. In *Chengama* v *Munisami* 20 Mad 75 at p 77 Yāj II 122 is quoted and it was held that, where the father divided joint family property among his sons and left no share for himself and a son was subsequently born to him, that son could sue for partition of his share in the property divided together with its accretions.

2 The regular form is *yavīyāmsah* according to Pāṇini VI 4 19 and VII. 1 70. Generally sixteen *saṁskāras* are enumerated. According to Yāj I 13 they were intended for purification. For males *upanayana* and marriage and for females marriage are the most important.

3 But Aparārka, Vir and others attribute this verse to Vyāsa.

* P. 106. (text)

ceremonies performed by their elder brothers according to the prescribed rites out of the paternal wealth itself

Yājñavalkya (2. 124) states a special rule as regards the *samatāras*¹ (marriages) of sisters —

(The brothers) whose purificatory ceremonies have not been performed should have their ceremonies performed by those brothers whose ceremonies have been already performed and the sisters also (should have their marriages performed) by allotting to them a fourth share out of the shares of the brothers.

The sense is that sisters should have their marriages performed by giving to each of them a fourth part of such share as would belong to a son of the class to which the sister belongs.

1 What ceremonies are obligatory and included in the word *samatāra* is a matter on which there was a sharp difference of opinion between Bombay and Madras. In *Gorind rasulu v Decara Bhatla* 27 Mad. 206 it was held that the absolutely necessary ceremonies in the case of males end with *upanayana*, that marriage is not an absolutely necessary ceremony in the case of males and that a sale of joint property for raising money for the marriage of a male coparcener was not a legal necessity. But this was dissonant from *Sundrabai v Shrinarayana* 32 Bom. p. 81 where it was held after quoting (at p. 80) the verse of Bṛ. If there be younger brothers &c. that the word *samatāra* ordinarily includes marriage. *Kamatarra Sastri v Vemachariu* 34 Mad. 422 followed 33 Bom. 81 and *G. Gopalakrishnan v B. Venkatarao* 27 Mad. 278 (F. B.) overruled 27 Mad. 206. In *Jairam v Hari* 31 Bom. 54 (where a suit was brought by a Hindu against his father and brother for partition) it was held that the brothers are entitled to have set apart from the family property a sum sufficient to defray the expenses of their prospective thread, betrothal and marriage expenses calculated according to the extent of the family property but that brothers' children are not so entitled. Vide also *Shrinayana v Thiru-chengada* 33 Mad. 250, *Gopalam v Venkataraghayulu* 40 Mad. 639 (where it was held that provision should be made for the marriage expenses of unmarried members at a partition but only for those who are of the same degree of relationship as those who have been married at the family expense) But in *Narayana Annari v Ramlinga* 30 Mad. 597 it was held that an unmarried coparcener is not entitled to have an anticipatory provision for the expenses of his future marriage at a partition and when the same case went to the Privy Council (in 45 Mad. 483 P. C. = 43 I. A. 168) the same principle was affirmed. 5 Lahore 375 follows 45 Mad. 483 and 53 Mad. 81 distinguishes it. In 23 Bom. L. R. 1412 it was held that the earlier Bombay cases (such as 31 Bom. 51) must be regarded as overruled by 45 Mad. 483 (P. C.) and in 30 Bom. L. R. 25 the court held itself bound to hold on account of the P. C. decision that at a partition it is not permissible to provide for the marriage expenses of unmarried members. It is submitted with the greatest respect that the attention of their Lordships of the Privy Council was not invited to the express texts of Bṛhaspati and Yāj. (II 121) cited in the Māyūkhya and that at some future day their Lordships would reconsider the whole law if the matter comes before them again. There is no doubt as regards the liability of the brothers to provide for the marriage expenses of their unmarried sisters when they come to a partition. *Chedalaradu Subbayya v Chedalarada Ananda Ramappa* 53 Mad. 81 (= 5 M. I. J. 826 I. B.) where it was held that in a partition between a Hindu father and his sons, the sons are liable for the future marriage expenses of their unmarried sisters in proportion to their shares of the property divided. In *Dhagarali Shankut v Ram Jatan* 45 All. 227 at p. 229 the quarter share for the sister is explained as meaning as much as will suffice for her marriage.

(Yājñavalkya (II 128--132) sets out a scheme of sons, principal and secondary, as it is of use in settling the taking of the heritage :

The *aurasa* is one who is begotten on the lawfully wedded wife ; equal to him is the *putrikāputra*¹, the ksetriya (the son of the wife) is one who is begotten on a person's wife by an agnatic kinsman or by a non-agnate, that is declared a *gūdhaja* (secretly born) son who is secretly born in one's house, *kāmina* is one born of a maiden and is considered the son of the maternal grandfather, *pauṇarbhava* (son of a *punर्विभू*) is said to be one who is begotten on (a married woman) whether the marriage had been consummated or not, that is *dattaka* (a son adopted) whom his mother or father gives (away in adoption) a *krīta* (bought) is one who is sold by them (i. e. by the parents), a *krītrima* is one who is made (a son) by the man himself, the *svayam-datta* is one who gives himself away (in adoption), a *sahodhaja*) is one who was in the womb (when his mother was married), he is an *apaviddha* son who, having been abandoned (by his parents), is received (in adoption by another)²

The *aurāsa* son begotten on a lawfully wedded wife of the same caste (as the husband's) is the principal (or primary) son The *putrikāputra* is of two kinds, the first of which Vasistha (17 17) describes

I shall give to you (in marriage) this maiden decked with ornaments who has no brother, the son who may be born of her will be my son

1. We saw above (p 36) that if a brāhmana has wives of different castes, the sons of the wife of the brāhmana caste are entitled to four shares, those of the wife of the ksatriya caste to three and so on This rule says that the daughter of a brāhmana from a brāhmani wife would be entitled to one-fourth of what her brother born of a *brāhmanī* wife would get on a partition, the daughter of a brāhmana from a ksatriya wife would be entitled to one fourth of what her brother born of a *kṣatriyā* wife would get Another matter of controversy is as to the exact meaning of 'a fourth share' The Mit relying on Manu 9 118 and Yāj II 121 remarks that a fourth share as above described was to be given to the unmarried sister The same was the view of Asahāya and Medhātithi But Bhāruci, the Dīyabhāgi, the Smṛticandrikā, Vivādratnākara, Halāyudha and others held that the sister was only entitled to a provision for marriage and not to an exact one fourth Vide notes to V M pp 157--158 It has been held that the custom of appointing a daughter is now obsolete Vide L R 2 I A 163, 31 Mad, 310, 1 Patna L J 581

2 It is to be noted that in the verse following these Yāj lays down that each of the succeeding sons out of those enumerated took in the absence of the preceding one and that this rule applied only when all these were ascertained to be of the same class (varṇa) as their reputed father *Putrikāputra* means either the son of the appointed daughter or the appointed daughter herself as a son Vide notes to V M, p 159 as to *putrikā*. The ksetriya was due to the practice of *nyoga* Vide Gautama Dh S. 18 4-8 and Manu 3, 59--60 for *nyoga* Modern Hindu law recognises only two kinds of sons out of the above, viz. *aurasa* and *dattaka* (except in Mithilā, where the *krītrima* also is recognised).

The same author (Vasistha Dh 8 17 15) speaks of the last (second) variety the putrikā (appointed daughter) herself is the third son (the other two being *aurasa* and *kṣetrāja*) In this (latter) case the father's obsequies and the like are to be performed by the daughter herself *Kṣetrāja* is one who is begotten at the order (appointment) of the elders on the wife of a sonless brother and the like by a sagotra (one belonging to the same gotra agnate) such as a husband's brother and the like. *Paunarbhava* is one who is begotten on *akṣatā* (i.e. a woman who had no sexual intercourse with the first husband) or on a *kṣatā* (i.e. a woman who had sexual intercourse with the first husband) by a second husband. The secondary sons other than the *dattaka* are prohibited in the Kali age, since among the matters prohibited in it (in Kaliyuga) we read 'the acceptance as sons of those that are other than the *dattaka* and the *aurasa*'

Now (begins) the topic of the *Dattaka* (adopted son).

Now the procedure as to the *dattaka* Mann (9 163) says ¹

He is to be known as the son given, whom the father or the mother affectionately gives (to another) as his son in (times of) distress confirming (the gift) with water the boy being of the same (varṇa with the person adopting)

Madana says that from the use of the word *or* (or) it follows that in the absence of the mother the father alone may give, in the absence of the father the mother alone (may give) but when both (parents) exist both should give [From the mention of *āpad* (distress) it follows that (a son) should not be

1. The whole of the action on adoption is briefly reviewed in 21 Bom 367 at pp. 374-377. The theory of adoption involves 'the principle of a complete severance of the child adopted from the family in which he is born both in respect of the paternal and maternal line and his complete substitution into the adopter's family' per Mitter J in 6 Cal. 250 (F.R.) which statement of the law was approved in L.R. 45 I. A. at p. 63, 25 Bom L.R. at p. 817 and 43 Mad. 211 at p. 215. Whom the father &c.—Vide *Shamsing v Shantabai* 23 Bom 557 where it was held that a Hindu who has a son can after becoming a Mahomedan give his son in adoption and can authorise his brother (the boy's uncle) to perform the actual giving. Mother—In *Pulirappa v Sarifreza* 23 Bom. L.R. 482 (F.R.) it was held following 21 Bom 83 and overruling 33 Bom 107 that a remarried Hindu widow cannot give in adoption a son by her first husband. Gives—there must be actual giving and taking. Vide *Mahapatral v Champalal* 1 Bom L.R. 812 (where it was held that where the boy was absent and there was no actual giving and taking and only a deed was passed there was no

given away (in adoption) when there is no distress¹. Viṇṇānes'vara holds that this prohibition (viz. a son should not be given when there is no distress) affects only the giver² (and not the receiver or the act of adoption) and is *puruṣārtha* (i. e. concerned only with the agent or his motives) and not *kratvartha* (i. e. not concerned with the religious act which has an unseen result). But this is not proper, since this prohibition (that a son should not be given in adoption when there is no distress) is understood to be *kratvartha*³, as it has an unseen result if we consider the syntactical connection (of it with the whole⁴ act). Even if it be conceded that a seen result somehow follows (from this prohibition), it is necessary to postulate some unseen result for the positive restrictive injunction⁵ (*nyama* viz. a

1. Some writers like Bālabhṛta and Kṛtyāyana quoted in D. M. take the word *āpad* to mean 'distress of the natural father such as famine', while others like Kullūka-bhaṭṭa take *āpad* to mean simply 'distress due to the absence of a son on the part of a sonless man'. Vide notes to V. M. p. 161.

2. 'Affects only the giver'—Vide 21 Bom 367 (F. B.) at p. 374 where this passage is quoted and explained.

3. The text of the Mayūkhya here is extremely abstruse and it would add to the bulk of the notes to point out that Mandlik and other translators and expositors are wrong. Therefore that task has not been attempted. Only those who have made a deep study of the Mīmāṃsā can follow the discussion here. *Puruṣārtha* and *Kratvartha* are technical Mīmāṃsā terms and are dealt with in the 4th chapter of Jaimini's sūtras. Some things are prescribed in the Vedic and other texts for doing which the sole motive is the desirable result, while there are other actions which do not directly bring about what is desired by the agent but are performed for helping forward some other action or thing which brings about something desired by the agent. The former are *puruṣārtha*, the latter *kratvartha*. For example, *gyotistoma*, which is prescribed as bringing about heaven, and heaven itself are *puruṣārtha*, while the *mayūgas* which form part of the procedure of the *dars'apūrnāmāsa* sacrifice are *kratvartha*. All substances useful in sacrifices and their purifications are *kratvartha*. If a thing that is *kratvartha* is not done or badly done, there is a defect in the *kratu* itself (the religious rite), but if a thing is simply *puruṣārtha* and it is not done or badly done there is no defect in the religious act itself, but the blame attaches to the agent alone. This reasoning was applied by the Mit. to the (implied) prohibition of not giving a son in the absence of distress, the result being that the act of adoption itself was valid, only the giver incurred blame. Vide notes to V. M. pp. 161--162.

4. -The adoption of a son is made for spiritual purposes (i. e. it has an unseen result just as heaven, the reward of performing *gyotistoma*, is an unseen result). Whatever is enjoined or prohibited in connection with this object is subsidiary (*anga*) to it and forms one connected whole with it. What is an *anga* to a religious act (*kratu*) is *kratvartha* (according to the Mīmāṃsā) and hence the prohibition is really *kratvartha*. *Vākya* is one of the six means of correctly interpreting Vedic texts.

5. A son could be given in adoption in distress as well as when there is no distress. Maṇu (9. 168) restricts the giving to a time of distress. This must have some spiritual or unseen result, as in the Vedic restriction of unhusking the grains of rice by mortar and pestle. *Niyama* is a technical Mīmāṃsā term. Vide notes to V. M. p. 163.

son should be given in adoption¹ in distress) and therefore if this restrictive rule be violated then one cannot secure the unseen result which is the urging motive (*prayojaka*) of the particular act (viz adoption here) * Some however hold that the word *āpad* (distress , in Manu's text) does not serve the purpose of implying a prohibition (of giving a son in adoption) when there is no distress but that word only conveys this that distress (*āpad*) is an occasion (on which a son may be given in adoption) since the word *āpad* cannot be construed as meant to exclude (only) the giving of a son in the absence of distress (i.e. there is no *parisaṃkhyā*) as such a construction would be liable to the faults of giving up the plain meaning and the like² Nor can it be urged (as an objection) that if *āpad* were only to be understood as the occasion³ (of giving in adoption) there would follow the undesirable conclusion that sin would be incurred by not giving a son (in adoption when another is) in distress for this passage (of Manu)

1. So far Mīlakapṭha shows that the Mlt. is not right in calling the implied prohibition (of giving when there is no distress) *purnāṛtha* and that if Mīmāṃsā is to be strictly followed it must be regarded as *kratertha* so that action opposed to it would make the adoption itself invalid. Then he puts forward the view of some that there is neither *nigama* nor *parisaṃkhyā* in Manu's verse but that verse is only permissive and puts forth the occasion when a son may be given. He does not refute this view and it looks probable that he approved of it.

2. For the terms *Nigama* and *Parisaṃkhyā* vide notes to V M. pp. 103-106. Vidhi pure and simple lays down what is unknown from any other ordinary source of knowledge, such as the text one who desires heaven should perform *ṛjotiṣoma*. A *Nigama* restricts the performance of a religious act to one out of two or more alternatives and prohibits the rest e. g. the text one should sacrifice on an even plot of land is a *nigama* as it restricts performance to even ground and prohibits performance elsewhere. A *parisaṃkhyā* is a permissive rule, it allows the doing of a thing, though it does not really enjoin it and prohibits the doing of things other than those allowed e. g. the text the flesh of the five five-nailed animals may be eaten is a *parisaṃkhyā* since it does not enjoin the eating of flesh, it only permits the flesh of five animals and impliedly prohibits the eating of the flesh of other animals. A *parisaṃkhyā* is always liable to three faults. It has to give up the plain sense (in the above the words read like an injunction that the flesh of five animals must be eaten i. e. there is *sūtrikaṭṭha*), we have to suppose that the text forbids the flesh of other animals (which is not expressed in so many words) and this implied prohibition is against what follows human cravings after flesh (i. e. there is *praplabdhika*). The view of some writers is that Manu's verse does not contain a *nigama* (as in that case it would be a sin not to give a son in distress) nor does it contain a *parisaṃkhyā* which latter should not as far as possible be resorted to as it is liable to three faults. That verse is simply a definition of *dattaka* and nothing more.

3. Certain actions were prescribed as always obligatory and certain others were prescribed for certain occasions (*nimitta*). If both *nitya* and *nimittika* actions were not performed, sin was incurred. If Manu's verse put forward *āpad* as the occasion of giving in adoption, then by not giving a son in adoption in *āpad* sin would be incurred. This objection is raised against the proposition of some that *āpad* is only a *nimitta* (occasion). It is answered in the words 'this passage &c. i. e. the verse of Manu simply defines *dattaka* and contains no command (*vidhi*)

simply conveys the relation between an appellation (*samjñā*, here *dattaka*) and the object denoted by it and it does not lay down (as a *vidhi*, a positive rule or injunction) the giving (of a son in adoption) on the occasion of distress.

As to what the same writer (*Vijñānes'vara*) says on the subject of marriage, viz ' in acting contrary to the prohibition against (marrying) a sickly girl and the like, one runs counter only to seen results, but the status of being a (legally married) wife, does follow ', that *drotum* also is refuted by this very reasoning ¹

Sadṛśam (in *Manu* 9 168), according to *Medhātithi*², means ' equal in family and qualities ' and not by caste and hence even one of the *ksatriya* class and the like may be a *dattaka* (adopted) son of a brāhmana and the like. According to *Kullūkabhatta*³ *sadṛśam* means ' equal by caste '. And this (view of *Kullūka*) is proper, since *Yājñavalkya*, after beginning the enumeration of all the twelve sons in the words ' the *aurasa* is one born of the legally married wife ' (II 128), concludes with the words ' this rule has been promulgated by me as regards sons of the same caste (as the father's) ' ⁴. This will be made clear by means of two texts of *Saunaka* to be cited later on. *Vijñānes'vara* also (holds) the same (view).

He (*Vijñānes'vara*) also says that the prohibition that the eldest son must not be given⁵ (in adoption) since the eldest son alone is the foremost

1. *Yāj* (1. 53) lays down that one should marry a girl who is not diseased, who has a brother and whose *gotra* and *pravara* are different (from those of the bridegroom) The *Mit* on this comments that even if one goes through the ceremony of marriage with a girl who is his *sapinda* or whose (father's) *gotra* and *pravara* are the same as the bridegroom's, there is no valid marriage and the girl does not become his *bhāryā* (a wife), but if one were to marry a sickly girl (in spite of the direction of *Yāj*), a valid marriage takes place and the girl is his lawful wife, only he runs counter to visible results (i.e. marriage with a sickly girl may cause worry and unhappiness and the children of the marriage may also suffer) This means that according to the *Mit* the prohibition against marrying a sickly girl is *puruṣārtha* and not *kratvartha*. *Nilakantha* seems to hold that it is *kratvartha*

2. *Medhātithi* composed a *bhāṣya* (commentary) on the *Manusmṛti*, which is the oldest extant one. He flourished about 300 A. D. Vide ' *History of Dharmas'āstra* ' pp. 268-275

3. *Kullūkabhatta* wrote a commentary on the *Manusmṛti*, which is the most widely known of all commentaries of *Manu*. He flourished about 1150-1250 A. D. Vide. ' *History of Dharmas'āstra* ' pp. 359-368.

4. *Dattaka* is one of the twelve sons and so *Yāj* is thinking only of a *saputṛya* *dattaka*. This is the reason why *Nil.* says that *Kullūka* is right

5. This passage of the *Mayūkha* up to the word ' *sarvam* ' below is referred to in 7 Bom. 221 at p 224. Vide also *Tukaram v Babaji* 1 Bom L. R. 144 at p 152 and *Vyas Chimanlal v Vyas Ramchandra* 24 Bom 367 (F. B.) at p 375. It has now been held that the prohibition as to the adoption of the eldest son is only admonitory, Vide 7 Bom. 221 and 2 Cal. 365,

(or the primary) agent in effecting the purpose to be served by the birth of a son as said in (Manu 9 106) a man becomes *putrin* (one who has got a son) the moment the eldest son is born to him affects only the giver (of the son) and not the acceptor (of the son)¹ (Nil. refutes the view of the Mit.) This prohibition might indeed have affected only the giver if this (text, Manu 9 106) did really prohibit the gift of the eldest son (in adoption). But it contains no such (prohibition) since there is no reason (to understand the text in that sense) and since the word *putribhavaḥ* conveying as it does that he becomes a *putrin* is simply meant to assert that the debt (that a man owes to his ancestors) is paid off (by the birth of the first-born son). On account of this (interpretation) the latter half (of Manu 9 106) he (the father) becomes free from the debt of *pitṛa* (ancestors) and therefore he (the eldest son) is entitled to (receive) the whole (wealth) from him (the father) is well construed (or connected with the first half). *Sarvam* (in Manu 9 106) means the whole wealth.

Only a male² can be a *dattaka* (adopted) and not a girl because the pronoun *śah* (he) occurring in the passage he should be known as the son given (Manu 9 168) that conveys the relation between a term (*dattakīma* i.e. *dattaka*) and the object denoted by it can refer only to a male of the same caste (as that of the person adopting) who (male) is the object of the action of giving away on the occasion of distress the gift being made by the parents and affection and water being the accompaniments (*gupa*) just as the word (the pronoun) *śam* in one should perform the initiation (*upanayana*) ceremony on a brāhmana of eight years³ and one should teach him (the Veda) refers to one on whom the initiation (*upa-*

1 The view of the Mit. discussed above follows immediately after the words about not giving a son when there is no *śpaḍ*. The words are *anśpaḍi na deyaḥ, dīturayātr pratīvedhah, tathā śah putro na deyaḥ, tathāśekha putra-vadbhāvepi jyaṣṭho na deyaḥ*. The Mit. does not expressly say that the prohibition against giving the eldest affects the giver only but Nil. from the context holds that the Mit. meant that. The Nālabhāṣṭi however explains the Mit. differently. A man was born under three debts, one of which due to his *pitṛa* (forefathers) he paid-off by begetting a son (vide Tal. S VI 8, 10 5 Ait Br VII 13). Paying off the debt of the ancestors and saving the father from *pitṛ* hell (Manu 2 138) were the purposes served by a son.

2. In *Gangaboli v Asant* 1 L.R. 13 Bom. 600 the adoption of a daughter by a brāhmana was held invalid after referring to the opening paragraph on adoption up to both should give (p. 101 above). Another vexed question has been the adoption of daughters by *naiṭins* (dancing girls). In *Maikara v Ess* 4 Bom. 543 West J. held that the custom of adopting daughters cannot be recognised in the case of *naiṭins* by the courts of law and such adoption confers no right on the person adopted. This was followed in *Tura v Aune* 14 Bom. 20 and *Jira Naiṭin v Radha* 37 Bom. 110. But the Madras High Court in *Isaku v Mahalinga* 11 Mad. 333 held that courts could recognise the custom of adoption of daughters by *naiṭins* and the court dissented from 4 Bom. 543. This was followed in 12 Mad. 214. But vide *Gonfiel v Jalajalsai* 21 Mad. 227.

nayana) rite is performed, who is a brāhmana of eight years and a male.¹ This reasoning refutes the *dictum* of some that the word *datṛima* ending in *map* (i. e. *ma*) according to the rule of (Pāṇini IV 4 20) " the affix *map* is invariably added in the sense of ' effected or brought about ' to a formation ending in *ṛi*" expresses also a girl given away to a bridegroom (in marriage) or to another (in adoption), since (in her case also) there is no distinction as to the fact of being brought about by gift.

Saunaka speaks of the mode of accepting a son (in adoption)—

I, Saunaka, will now expound the excellent (mode of) adoption. One having no son (male issue)² or one whose son (male issue) is dead, having observed a fast for the sake of (adopting) a son, having made gifts of a pair of wearing garments, a pair of ear-rings, a turban and a ring to an ācārya (priest), who is a thorough master of the Vedas, a devotee of Viṣṇu and who is religiously disposed, and having brought a bundle of kuśa grass and fuel-sticks of the *pālāśa* (Butea Frondosa) tree, having summoned his relatives and kinsmen and having feasted them and specially brāhmanas, having performed the whole of the details (*tantra*) of the rites commencing with *anvādhāna* (placing of fuel-sticks on the consecrated fire) and such other rites as purification of the clarified butter (by passing two blades of kuśa grass through it) and having gone before the giver (natural father of the boy), he should cause a request

1 For supporting his proposition that only a male can be adopted, Nīlakantha cites a parallel based on a Vedic text *Upanayana* (initiation for Vedic study) is performed only in the case of males, so adoption also should be confined to males. Vide Apastambagrhya IV 10 2 and Sudarsanācārya's commentary thereon for the Vedic text ' astavarsam ' &c. The general rule is that the number and gender of a word are not to be insisted upon as in the well-known example ' he cleanses the cup ', where though the singular is used all cups are to be cleansed. But in certain cases the gender of a word is to be insisted upon as laid down by Jaimini in IV I 17. The word *guna* (subsidiary matter) is used in a technical sense. Vide notes to V M pp 168-169.

2 *Tri* is affixed according to Pāṇini (III 3 88) and has *ma* then added on. The word *datṛima* according to Pāṇini means ' brought about by gift ', which may apply to a male as well as female. Just as a son is *datṛima* because his status (as adopted son) is brought about by the action of giving, so a girl adopted by another or married by another may also be called *datṛimā* since her status as bride or as adopted daughter is equally brought about by the act of giving. This is the reasoning of some. Nīl. says that this is refuted by the parallel example of *upanayana*.

3 The word *putra* stands for son, grandson and great-grandson. In *Hanmant v Bhīmacharya* I L R 12 Bom 105 it was held that an adoption by a childless Hindu is valid even though his wife be pregnant at the time of adoption and even if she later gives birth to a son. In *Gopal v Narayan* 12 Bom 323 it was held that an unmarried man may adopt. In *Bharmappa v Ujjangauda* 46 Bom 455 (= 23 Bom L R 1320), after referring at p 453 to the texts of Atri, Manu and Saunaka and to Mandlik's translation of *aputra* (at p 460) it was held that a man having a grandson disqualified from inheritance owing to congenital and incurable dumbness cannot adopt a son and that there is nothing in the Vyavahārmayūkha to lend support to the view that he can adopt. Vide *Nagammal v Saṅkarappa* 54 Mad 576, 585 which dissents from 46 Bom, 455.

to be made to him give me your son. The giver being capable of making a gift (should give his son) with (after reciting) the five (ṛk verses) ye yajñena (Rgveda X 62 1-5) and (the adopter) having taken (the boy) with both his hands after repeating the *mantra* 'devasya tvā' (Vaj S 21 3 Kāṇhaka S I 2 4 &c) having inaudibly repeated the verse (ṛk) 'angāḍ-angāḍi &c' and smelt the top of the boy's head having decked with clothes and the like the boy who bears the appearance (or resemblance) of a son (of the receiver's body), having brought him in the middle of the house to the accompaniment of dancing singing instrumental music and benedictory words, having cast into fire according to the *sūtra* offerings of boiled rice with the ṛk *yastvā hṛdā* (Rg V 4 10) with the ṛk *tubhyam agre* (Rg X 85 88) and (offered) five oblations of rice with each of the ṛks beginning with *somo dadat* (Rg X 85 41) and having performed the *homa* to (Agni) *sviṣṭakṛt*² he (the adoptive father) should finish the rest (of the rites). Among Brāhmanas the adoption

1 The first half of it occurs in 8 *śatapatha Br.* 14 2, 4, 8 the whole occurs in the *Mānavagṛhya* I. 18. 6, which adds that the father after returning from a journey and having smelt the top of the son's head, should mutter it. It occurs in the *Nirukta* (III. 4) also. Vide *Bhagwan Singh v Bhagwan Singh* 17 All 224 at p. 286 where Edge C. J. prefers Buhler's translation 'he should then adorn the child which (now) resembles a son of the receiver's body' to Mandlik's translation (p. 69) 'having with clothes and the like adorned the boy bearing the reflection of a son'. Vide p. 270 where Mandlik's translation of 8 *śaunaka* a text quoted in the *Vyavahāramayūkha* is cited.

2 *Homa* to *Sviṣṭakṛt* is the one offered to fire (Agni) called *Sviṣṭakṛt* at the termination of a sacrificial act. It has been held that the *dattahoma* is not absolutely necessary for the validity of an adoption even among brāhmanas if the adopted boy belongs to the same *gotra* as the adoptive father. Vide *Dal Gangadhar Tilak v Śrinivās* L. R. 42 L. A. p. 185 at p. 160 (= 30 Bom. 411) *Gorindayyar v Dornesami* 11 Mad. 5 (F. B.) *Sheolatan v Bhargava* 2 Patna L. J. 481 *Gorindayyasud v Rindabai* 42 Bom 515 (= 27 Bom. L. R. 305). In this last case the adoption of a boy of a different *gotra* by a Kanol Brāhmana's widow without *dattahoma* was held invalid. Where the actual giving and taking took place during the lifetime of the adoptive father the *dattahoma* where necessary may be performed after his death by his widow or another person (vide *Venkata v Subhadra* 7 Mad. 568, *Mandarilli Sektaramamma v Andalilli Suryanarayana* 40 Mad. 903). In *Sri Sri Chandramala v Sri Muktamala* 6 Mad 20 it was held that among Kṣatriyas in the Madras Presidency an adoption without *dattahoma* was valid but in *Ranganayakamma v Alwar Selli* 15 Mad 214 at p. 215 it was held that *dattahoma* would be necessary for the validity of an adoption among Kṣatriyas (or *vaiśyas*). In *Makashaya Shashinath v Shrimall Krishna Sundari* L. R. 7 I A p. 240 the Privy Council observed (p. 255-56) 'The mode of giving and taking a child in adoption continues to stand on Hindu law and Hindu usage and it is perfectly clear that among the twice-born classes there could be no such adoption by deed because certain religious ceremonies, the *dattahoma* in particular are in their case requisite. This was an *abiter dictum* since the point there was whether among *śūdras* there could be a valid adoption by mere deed without actual giving and taking. Still being the dictum of the highest tribunal for India it is entitled to great respect.

of a son should be made from amongst the *sapindas*¹ or in the absence of them (*sapindas*), one who is not a *sapinda* (may be adopted), but (one) should not adopt (a son) from elsewhere (i e. from another caste) Among ksatriyas, (one) from their own caste or one whose *gotra* is the same as that of the (adopter's) preceptor² (should be adopted), among *vaś'yaś* (one) from amongst those born in the *Vaiś'ya* caste and among *s'ūdras* (one) from amongst the *s'ūdra* castes (should be adopted)³. In the case of all the *varnas* (the four castes) from their respective castes only (are adoptions to be made) and not from a different (caste) And a daughter's son and a sister's son are given in adoption to a *s'ūdra* also One having an only son^{4*} should never give in adoption his son. By one having several sons the giving in adoption may assiduously be resorted to A *brāhmāna* (should adopt) after bestowing on his priest a *dakṣinā* (gift or fee) according to his ability, a king (after bestowing) even as much as half (of the yearly revenue) of his kingdom,⁵ a *vaś'ya* three hundred coins, a

1. The Mit on Yāj I. 52 defines the meaning of *sapinda* in connection with the topic of marriage and on Yāj, I 53 sets out the limits of *Sapinda* relationship. The Mit. lays down the general proposition that wherever the word *sapinda* occurs, connection through particles of the same body directly or mediately has to be understood *Sapinda* relationship plays the most prominent part in three topics, viz marriage, inheritance and succession and *āśauca* (impurity on birth and death) For a translation of the Mit. passage on *sapinda* vide *Lallubhai v Mankuvarbai* 2 Bom 388 at p 423, *Lallubhai v Cossibai* 7 I. A 212 at p. 232 = 5 Bom 110, 119 and *Kessibai v Hunsraj* 30 Bom 431 (P C) at p 443. The passage from ' Among *brāhmanas* &c ' to ' sister's son are given in adoption to a *s'ūdra* also ' is quoted in 17 All. 294 (F B) at p 376 and in 9 Mad 44 at p 51 (where it is said that the *Dattaka-mīmāṃsā* and *Dattakacandrikā* add one half verse viz *brāhmanādi-traye nāsti bhāṅineyaḥ sutaḥ kvacit*).

2 According to the *Ās'valāyanaśrautasūtra* I 3 and the Mit (on Yāj I 53) ksatriyas were supposed not to have special *gotras* of their own and it is laid down that their relations are regulated by the *gotras* of their *purohita* (family priest) It is however noteworthy that *Ās'valāyana* (S'r S VI 15) himself gives *Mānava*, *Aila* and *Paurūravasa* as the *pravaras* of ksatriyas For the meaning of *gotra* vide *Āpastamba Dh S II 5 11 15* in S B E Vol II p 126 n and *Kalgaṇḍa v Somappa* 33 Bom 669, 682-683.

3 In *Tukaram v Babaji* 1 Bom L R 144 an adoption by a woman who was a *Tilari* (inferior Lingayat) of a boy who was a *Kulvadi* or *Mahratta* was held to be valid

4 At one time courts held that the adoption of an only son was entirely null and void, vide *Lakshmappa v Ramava* 12 Bom H C R 362, 376, *Waman v Krishnaji* 14 Bom 249 (F B), *Basava v Lingangavda* 19 Bom 428 (where all texts and authorities are elaborately discussed), but now all High Courts hold that such an adoption is valid Vide *Sri Balusu Gurulingaswami v Sri Balusu Ramalakshamma* L R 26 I A 113 (= 22 Mad 398), *Radha Mohun v Hardai Bibi* 21 All 460 (P C), *Vyas Chumanlal v. Vyas Ramachandra* 24 Bom 367 F B at p 375 (= 2 Bom L R 163)

5 The D M explains ' half kingdom ' to mean half of the yearly revenue of the kingdom and ' *saiśvasa* ' (all wealth) to mean the whole of a year's income This seems reasonable.

s'ūdra even the whole (of his yearly) wealth if he be unable (to pay so much) according to his ability

Ohāydvahaham (bearing the appearance or reflection) means similar to *Dauhitro bhāginsyasa* (a daughter's son and a sister's son) Just¹ as in the passage he (the sacrificer or the *adhvaryu*

1 This is among the most difficult passages of the *Vyavahāramayūkha*, containing as it does a highly technical discussion of Pūrva Mimāṃsā doctrines. For detailed explanation of various terms, vide notes to V M. pp. 1 8-177 The *Maitrivarupa* is an assistant of the boty priest in sacrifices, whose business it is to loudly repeat the *praiśas* (directory formula) such as 'hoti yajati &c. A staff is given to a sacrificer when he is initiated for a sacrifice. This effects a *samākāra* (purification) of the sacrificer. The staff is a thing that already exists (*bhūta*) but it serves a future purpose also (i. e. it is a *bhāvayuppogi*) The staff is given to the *Maitrivarupa* by the *adhvaryu* (or the sacrificer according to some) for holding firmly as said in the sentence he gives a staff to the *maitrivarupa*. What is of use in future or what is to be accomplished is called *bhāvya*. In the sentence one desirous of heaven should offer a sacrifice the real meaning is 'by sacrifice heaven should be accomplished' i. e. heaven is the object or goal (*bhāvya*) to be accomplished and is put in the accusative case (*yajena vargam bhāvayet*) So it may plausibly be argued that, though the staff is already existing (*bhūta*) it is of use to the *Maitrivarupa* and is put in the accusative case and so it is the *bhāvya* (the object to be accomplished, the principal thing) But this is not correct. Vide Jaimini IV 2. 16-19 for a discussion. There is another sentence the *Maitrivarupa* holding the staff repeats the *praiśas* i. e. the staff serves him as a support when loudly repeating *praiśas*. The dative case (in *maitrivarupāya dandam* &c.) shows that the intention is to regard the *Maitrivarupa* as the principal (*pradhāna*) factor in this sentence and not the staff. The giving of the staff effects a *samākāra* in *Maitrivarupa* and therefore that is the *vidheya* (the matter enjoined) in this sentence. This reasoning is extended to the words of 8 *śaunaka* that a daughter's son and a sister's son are given to a *śūdra*. Here also there is giving (*dāna*) as in the sentence he gives the staff &c. and the word a *śūdra* is put in the genitive case which has the sense of dative. Therefore s'ūdra is like *Maitrivarupa* the principal factor (*pradhāna*) in this sentence and the *bhāvya*. The gift of the daughter's son and sister's son is the *vidheya* (what is enjoined) with reference to a *śūdra*, the idea being *dauhitrabhāginsyadānena* a *śūdrām bhāvayet*. The Vedas lay down for all (including a *śūdra*) the duty of paying off the debt due to the ancestors by means of sons. So it follows as a matter of course that a sonless *śūdra* should adopt a son. Therefore the words a daughter's son &c. are not to be construed as prescribing adoption for s'ūdras (as that is already known) but they lay down a restrictive injunction (a *nigamanā vidhi*) for a *śūdra* that he is to adopt a daughter's or sister's son if available. S'ūdra being the principal (*śaṅka*) is the *bhāvya* and the *dauhitra* and *bhāginsya* are the *śaṅka* since they serve the purpose of the s'ūdra by enabling him to pay off a debt. For *śaṅka* and *śaṅka* vide Jaimini III 1. 2 G. The *vidheya* (thing enjoined) is the gift of the two. It is a restrictive rule and its province is *dauhitra* and *bhāginsya* and not s'ūdra. It is possible for a *śūdra* to adopt any one whether *dauhitra* and *bhāginsya* or not. But if this sentence is taken as a *nigamanādi* he must first choose the *dauhitra* or *bhāginsya*, that is the text means *dauhitrabhāginsyān aśūdrāya*. If this were not accepted then the text of 8 *śaunaka* would have to be construed as *dauhitra-bhāginsyān aśūdrāya* (daughter's son and sister's son are to be adopted by the s'ūdra alone) This would make the sentence a *parivāṇādi* (allowing the adoption of the two to *śūdra* as but forbidding it in the case of members of the regenerate classes) which is to be rejected to only if no other construction is possible as it is liable to three faults (explained above p 107 n 2) It is always better to construe a passage as a *nigamanā* than as a *parivāṇādi*. Hence

priest) hands over a staff to the *matrāvaruṇa* ', although it is possible to regard the staff as the *bhārya* (the principal factor or goal) since it is an already existing thing and is of use in the future, yet the *matrāvaruṇa* himself, who serves a purpose in future as the agent of the act of repeating the *praiṣas* as said in the passage '(the *matrāvaruṇa*) holding the staff repeats the *praiṣas* ', is expressed to be the *bhārya* by the dative form (viz. *matrāvaruṇāya* in the passage first quoted), similarly here also (in the text of S'aunaka ' the daughter's son &c ') the *s'ūdra* himself, who has not paid off the debt (to his ancestors), is the *bhārya* on account of the possessive case (1 o *s'ūdrasya*) that is used in the sense of the dative, he being the *s'ēṣin* (the principal whose purpose is to be served by another) with reference to the daughter's son and the sister's son (that are *s'ēṣa* 1 o serve his purpose) Hence those two themselves (daughter's and sister's son) being the *vidheya* (what is enjoined), it follows also that (in the passage of S'aunaka) they two alone are the province or subject matter of the restrictive rule (*nyamavidhi*) in the form ' daughter's son and sister's son alone (are to be adopted) by *s'ūdra* ', while the *s'ūdra* not

Nil construes the text as a restrictive rule (*nyama*). How difficult this passage is may be understood from the suggestion of Mr. Gharpure to take ' *vidheyatvena* ' as equal to ' *vidheyatvābhāvena* ' (tr p. 72 n 7) It is rather strange that in *Vyas Chimanlal v Vyas Ramchandra* 24 Bom 473 at p 480 it is said that the V M. is opposed to the adoption by the regenerate classes of the daughter's son and sister's son and in *Gopal Narhar v Hanmant Ganesh* I. L. R. 3 Bom 273 at p 280 there is an elaborate discussion on this point, the conclusion reached being ' we see no reason for supposing that he intended to relax the interdiction of such adoptions by brāhmanas, ksatriyas and vais'yas ' It is submitted with great respect that this is wrong. The V M. approves of what is said in the *Dvaitanirnaya* by S'ankarabhaṭṭa and in the *Dvaitanirnaya* it is expressly said (vide notes to V. M. p. 180) that brāhmanas and others can adopt the daughter's or sister's son. In 17 All 234 (F B) it was held that the Benares school does not prohibit the adoption by the three regenerate classes of the daughter's or sister's son, or mother's sister's son but this was over-ruled in *Bhagwan Singh v Bhagwan Singh* 26 I. A. 153 (= 21 All 412), where the adoption of a mother's sister's son by a ksatriya was held to be absolutely void According to all High Courts in India, it may be taken as settled that the adoption of these three (daughter's son &c) by the three regenerate classes is forbidden Vide *Mussummat Sundar v Mussummat Parbat* 16 I. A. 186 (Allahabad case), *Gopalayyan v. Raghupatiayyan* 7 Mad H C R. 250, *Bhai v Hari* 25 Bom L R 411, *Walbai v Heerbai* 31 Bom 1401 (mother's sister's son). But there are several decisions holding that the adoption of a daughter's son or a sister's son may be valid by custom even among brāhmanas Vide 14 All 53 (adoption of sister's son by Bohra Brāhmins of North West Provinces), *Gowri v. Shivrām* P. J. 1894 p. 30 (adoption of daughter's son among Havik brāhmanas of Canara), *Manjunath v Kaveribai* 4 Bom L R 140 (adoption of a sister's son among Sarasvat Brāhmanas of Canara), *Vayidmada v Appu* 9 Mad 44 F B (adoption of daughter's or sister's son by brāhmanas of South India upheld), *Viswasundar v Somasundara* 43 Mad 876 (adoption of a daughter's son among brāhmanas of the Andhra or Telugu country), *Sundrabai v. Hanmant* 34 Bom. L. R. 802 (= 56 Bom 238) where the adoption of a daughter's son by a *Deśastha* Smārta brāhmaṇa of Dharwar was upheld on the ground of custom.

being the *vidhaya* (what is enjoined) in that passage cannot possibly be the province of a *niyama*. If the text (of S'aunaka daughter's son &c.) were explained as the two (may be adopted by s'ūdra only, the (undesirable) consequence would be that there would be a *parisaṅkhyā* (implied exclusion inferred from a permissive rule) in the case of brāhmanas and others who also (like the s'ūdra) are *śepin* (with reference to the act of adoption that serves the purpose of all and is therefore *śepa*)

Therefore the daughter's son and the sister's son alone are the principal (adoptees) for a s'ūdra. Failing them any one else of the same caste (may also be adopted) since the same author himself (S'aunaka) says among s'ūdras (one) from among the s'ūdra castes. Nor (can it be urged that)¹ this word *jāti* (caste) should be so narrowed down as to be limited to only the daughter's son and sister's son (of a s'ūdra) since the status of being a daughter's or a sister's son and that of belonging to the same caste are not co-existent and since the (undesirable) conclusion would follow that in the same *śmṛti* (passage) a general rule will have to be regarded as redundant.

And this matter has been expounded in the *Dvīatanurūpa*² by my revered father. To the same effect is the usage of the *ś'as'as* (cultured or respectable people).

Thus the right of * the s'ūdra (to adopt) being established like that

1. Nor can it be urged &c. — In this Nil. anticipates an objection and meets it. S'aunaka gives a general rule (*śūdrasya vākyā*) that among s'ūdras adoption should be from among s'ūdra castes. He also gives the particular rule that a *daśakṛta* and *bhūgiṇya* are for a s'ūdra (which has been construed above as a restrictive rule). These two must be so construed as not to conflict. That can be done by saying that a s'ūdra can only adopt a *daśakṛta* or *bhūgiṇya* who is of the same caste with him and that he cannot adopt anyone else even of his own caste. Nil. does not accept this and gives two reasons. An *aprasaṅgha* (narrowing down of one sentence to another) is possible only when the two sentences stand in the relation of general proposition and particular proposition. Vide *Jaimini* III. 1 26-27. But the above two sentences do not stand in that relation. When inter-marriages were allowed a s'ūdra's daughter or sister could have married a person of a higher caste and his *daśakṛta* or *bhūgiṇya* would not have been a s'ūdra but of a mixed caste. Nil. gives another reason also for rejecting the narrowing down. If a s'ūdra cannot adopt anyone of his own caste except *daśakṛta* and *bhūgiṇya* the general rule of S'aunaka (viz. among s'ūdras one from the s'ūdra castes) becomes useless. Therefore to give free scope to both rules one should construe that for a s'ūdra the principal adoptees are *daśakṛta* and *bhūgiṇya* and failing them any a s'ūdra. Vide notes to V 31 pp 178-179. This passage has nothing to do with the fault called *vīkṣyabodha* as Mr. Gharpure supposes (p. 71n, 1).

2. The *Dvīatanurūpa* is a work of Sādkaṛabhaṭṭa, the father of Nil. which contains discussions in accordance with Mīmāṃsā principles on various knotty points of *dharma śāstra*. For a full account vide my paper on the work in the *Annals of the Dharmaśāstra Institute* vol. III, part 2, pp 67-72.

— P 111 (text).

of the Nisāda¹ who is a chief (to perform Raudra sacrifice), the *dictum* of the S'uddhiviveka, that the s'ūdra is not entitled to make the adoption of a son, which is accompanied with *homa*² that is to be performed with the Vedic *mantras*, is refuted. The *homa* with vedic *mantras* should, however, be performed by him (by the s'ūdra who adopts a son) through a brāhmaṇa, since Parāśara (6 63-64) says :

He for whom a fast, a *vrata* (certain penance or act vowed to be done), a *homa*, ablution at a holy place, muttering of prayers and the like are performed by brāhmanas, secures the fruit (the merit) thereof.

Smārta³ and Harinātha also say the same thing. As to what Parāśara himself says (12 39) :

That brāhmaṇa, who for the sake of daksinā (gift of money or fee) offers oblation into fire on behalf of a s'ūdra, would become a s'ūdra, while the s'ūdra (for whom he offers) would become a brāhmaṇa that, according to Mādhyama,⁴ propounds that the merit of the rite goes to the s'ūdra and the brāhmaṇa incurs sin.

Even a woman is entitled like the s'ūdra to adopt, since there is a text ' women and sūdras have the same rules of conduct ' (prescribed for them).⁵ Vasistha⁶ (Dh S 15. 1-9) says " man produced from seed and blood

1 The Nisādashapati-nyāya is a well-known one. Vide notes to V M p 181. A Nisāda was the offspring of a brāhmaṇa from a s'ūdra woman (Manu X 3) and so belonged to a mixed caste. In speaking of the Raudra isti (sacrifice), the Veda says that a Nisādashapati should be made to perform that sacrifice. Jaimini (VI I. 25-38) establishes that only members of the regenerate classes are authorised to perform vedic sacrifices. Therefore a question arises whether *nisādashapati* (who is to perform Raudra sacrifice) means the chief (*sthapati*) belonging to one of the three higher castes who rules over nisādas or one who is a chief and also a nisāda. The conclusion is that on account of the express words of the Veda, it is the chief of the nisāda caste who is meant, though he is not authorised to perform Vedic rites in general. Vide Jaimini VI. 1 51. A s'ūdra also on account of the express words of S'aunaka is entitled to adopt. The S'uddhiviveka is a work of Rudradhara, who flourished between 1425-1460 A. D. Vide ' History of Dharmasāstra ' pp 395-397.

2 In *Indramoni v Beharilal* L R 7 I. A 24 (adoption among s'ūdras of Bengal) it was said that *dattahoma* was not necessary among s'ūdras and that the latter may be performed through the intervention of a brāhmaṇa. Vide also *Ravi v. Lakshmi* 11 Bom 381 at p 393.

3 Smārta is an appellation of the great Bengal writer Raghunandana. The work referred to is his *Sambandhatattva*. Harinātha is the author of a large digest on dharma-sāstra called *Smrtisāra*. The text of Parāśara and the Mayūkhya thereon are quoted in *Atmaram v Madhava* 6 All 276 (F B) at p 281.

4 Mādhyama is the famous minister of the great Vijayanagara emperors Bukka and Harihara, who wrote numerous works. The work here referred to is his commentary on Parāśara (Vol II part 2 p 20).

5 ' Women and s'ūdras &c ' — Vide Manu IX 18 and Baud Dh S IV 5 4. This rule applies only where a woman performed a religious act independently by herself. She was, however, authorised along with her husband to take part in vedic rites. Vide Jaimini VI 1 17.

6 The whole of this passage from Vasistha (except the last sūtra) is translated in *Ganga Sahas v Lekhraj* 9 All 253 at p 300. The passage from ' man ' to ' permission ' is quoted in *Tulsi Ram v. Beharilal* 12 All 328 at p 338 and 30 Cal. 365 at p 372.

owes his birth to his mother and father (Hence) the mother and the father have power to give to sell or to abandon him. But one should not give or accept an only son¹ for he saves a man (from pur hell). A woman should neither give nor receive a son (in adoption) unless with the permission of her husband². One about to take a son in adoption should after having invited his kinsmen having informed the ruler³ (of the intended adoption) and having performed a *homa* in the middle of his house with the *vydhytis* take (in adoption) only him who is closely related and who is a kinsman not remote (in habitation and speech)*. If a doubt arises (as to the family and qualities of the person to be adopted) he (the person desirous of adopting) should treat one whose kinsmen are in a remote place as if he were a *sūdra* for it is declared (in the Brāhmaṇa works) that by means of one (son *aśura* or adopted) he (the adopter) saves many. If after a son is taken (in adoption) an *aśura* son is born (to the adopter) he (the adopted son) shall be the recipient of a fourth share⁴.

1 One only son.—In the printed Vasiṣṭha Dh. 8. we read for he is (required) to continue the line of his ancestor's in place of for he saves &c. This text was very much discussed in several cases in connection with Jaimini's rule that certain texts containing the statement of a reason are merely recommendatory. Vide *Bowen Prasad v Hardai* 1884 14 All. 57 (F B) at pp. 72-73 and *Radhā Mohan v Hardai* 1884 21 All. 460 (P C.) at p. 493 for discussion of Jaimini. Jaimini's rule is contained in what is called the *Aśura-nigadādūharaṇa* (I 2. 26-30). Vide also 22 Mad. 328 (P C.) at p. 425.

2. This text of Vas. has given rise to varying interpretations. According to the Dattaka mīmāṃsā, a widow cannot adopt at all as her husband's permission cannot be had at the time of adoption. Others hold that the widow can adopt, if the husband gave her authority to adopt. The Madras decisions hold that the words consent of the husband are only illustrative and a widow can adopt also with the consent of the sapindas of the husband. The Mayūkhā holds that a widow can adopt a son or give her son away even in the absence of the husband's consent provided he has not prohibited her from doing so. Vide for this passage *Ishoda v Bapu* 15 Bom. 110 at p. 181 (where Mandlik's translation her father is regarded as correct and relied upon) and *Rangubai v Bhagirathai* I L. R. 2 Bom. 877 at p. 880 the *Collector of Madras v Maroo* 12 Moo. I A. 307 at pp. 435-436 and *Rafiah Venkatappa v Ranga Rao* 30 Mad. 772 at p. 775.

3. Vide *Narhar Gorind v Narayan* I L. R. 1 Bom. 607 where it was held that the sanction of Government to an adoption by a Kulkarni or his widow is not necessary to give validity nor has Government any right to prohibit or otherwise interfere in such an adoption. Vide also *Dalaji v Datto* 4 Bom. L. R. 703 (= 27 Bom. 75).

4. This has been interpreted in Bombay as meaning that he takes $\frac{1}{4}$ of what the *aśura* takes and not of the whole estate i. e. the adopted son takes $\frac{1}{4}$ and the subsequently born *aśura* son $\frac{3}{4}$. Vide *Giriya v Nigapa* 1 Bom. 100 at p. 101 where this text is quoted and also the remarks of the V. M. a little later on about the *Dryāṇṣṭyāgā* a (at p. 116 text). Vide also *Dhondo v Appaji* P. J. 1893 p. 6 *Tularam Mahade v Ramchandras* 49 Bom. G. S. = 27 Bom. L. R. 921 (where it is held that there is no distinction to respect of the share even among a *śūdra*). In *Malā Krishnayya v Venkataswami* 48 Mad. 393 it was held in a suit for partition brought by the father and the *aśura* son against the previously adopted son that the adopted son would get $\frac{1}{4}$ the father and *aśura* son $\frac{3}{4}$ each. But in *Jerram v Sullarnayadu* 48 I. A. 290 (= 41 Mad. C. C.) the Privy Council held that among a *śūdra* in Madras and Bengali adopted son shares equally with an after born *aśura* son as the Dattaka-mīmāṃsā says. Vide *Ansa Mohan v Sreedā Mohan* 20 C. W. N. 201 P. 113 (text).

The permission of the husband, however, is (required) only for a woman whose husband is alive, since it (permission) serves an evident (or visible) purpose; but in the case of a widow, it (adoption) takes place even without it (i e. without husband's permission) with the assent of the father¹ and failing him with that of the *jñāti* (kinsmen) Hence it is that Yājñavalkya (I 85) lays down woman's dependence on her husband with reference to a particular state alone (viz. during marriage and his life)

The father should guard the unmarried daughter, the husband when she is married, (her) sons in her old age; failing them (sons), their kinsmen (should guard a woman). A woman has no independence at any time.

In the absence of him (the husband) or when, owing to old age and the like, he is unable (to protect her) there is dependence (for her) also on the sons and the rest By Kātyāyana also the assent of the father, husband and the like has been stated with reference to particular states (of a woman)

Whatever acts for the benefit (of her soul) after her death a woman does without being permitted by the father, the husband or the son brings no fruit to her.

Aurdhvadehikam (in Kātyāyana's text) means ' having reference to the other world ' Therefore that permission of the husband which follows (as a matter of course as a requisite) in a certain condition (viz when he is living) is merely re-iterated in this (passage of Vasistha) and is not enjoined as a new and positive injunction² Hence a widow has authority (to adopt)

1. The translation of Mandlik ' her father ', which Mr Gharpure follows (p 79), is not correct The word ' father ' here must be taken to mean from the context ' the father of the husband ' (i e the widow's father-in-law) and not her own father The father of the widow has nothing to do with the family and property of her husband The woman by marriage passes into the husband's *gotra* and his *jñātis* become her *jñātis* also So *jñātis* here mean her husband's kinsmen *Jñāti* generally means agnatic relations, vide Manu 9 264, 9 239 and *Vishvasundara v Somasundara* 43 Mad 876 at pp 884--885 where the meaning of *sapinda* and *jñāti* in the matter of taking consent is discussed and it is held that the latter word means agnates and that to an adoption by a widow her daughter's son's consent was unnecessary. In *Kesar Singh v The Secretary of State for India* 43 Mad 652 (where the decision in 43 Mad 876 was not approved of) it was held that if no agnates were left the consent of a *bandhu* might suffice In *Vithoba v Bapu* 15 Bom 110 (where the adoption by a predeceased son's widow with the permission of her father-in-law was upheld though there was no consent of her brother-in-law) Candy J appears to quote (at p 131) Mandlik's translation ' the husband's permission no independence at any time ' with approval (including the words ' her father ') but the decision shows that the father in that case was the father of her husband (and not her father).

2 The words of Vasistha ' a woman should not give without the permission of her husband ' do not, according to Nil prescribe a rule unknown from other sources (i e. they do not contain an *apūrvavādhi*), but they simply re-iterate (i e they are a mere *gnatūda*) what is well-known.

even without the permission of her husband¹

Adurebāndhavam (in Vasistha's passage above) means a near sapinda as far as possible. And even among nearer (sapindas) the brother's son is the principal (adoptee) since Mann (9 189) says —

If among brothers sprung from the same (father) one has a son, Manu has declared that on account of that son all become putrins (persons having a son)

1. The decisions of the Indian courts and of the Privy Council on the widow's power of adoption are numerous, but as they have no direct bearing on the text of the *Mayūkha* they are passed over. It is important to note, however, a few Bombay decisions. In *Ramji v. Ghaman* 6 Bom. 428 (P. B.) it was held that a Hindu widow who has not the family estate vested in her and whose husband was not separated at the time of his death is not competent to adopt a son to her husband without his authority or the consent of his undivided coparceners. In *Yadao v. Namdeo* 48 I. A. 518 certain dicta of their Lordships (at pp. 524-526) of the Privy Council seemed to cast doubt on this Full Bench decision, but it was held that the Privy Council decision had not overruled the Full Bench decision in 6 Bom. 428 and that a widow in a joint family cannot adopt without the consent of surviving coparceners (vide *Ishwar Dadu v. Gajabai* 50 Bom. 468 P. B. = 28 Bom. L. R. 792). But in *Dhimbai v. Gurnathgouda* 36 Bom. L. R. 200 (P. C.) the Privy Council has very recently overruled the decisions in *Ramji v. Ghaman* and *Ishwar Dadu v. Gajabai* and has held that the widow of a coparcener in a joint Hindu family in the Mahratta country of the Bombay Presidency has power to make a valid adoption without either the express authority of her husband or the consent of surviving coparceners. The Privy Council relies on their earlier decision in *Yadao v. Namdeo* and refers to *Mayūkha* viz. the words 'the permission of the husband'. Hence a widow has authority to adopt &c. Ranade J. in *Payappa v. Appanna* I L. R. 28 Bom. 827 stated the settled rule as 'It is only the widow of the last full owner who has the right to take a son in adoption to such owner and that a person in whom the estate does not vest cannot make a valid adoption, so as to divest (without their consent) third persons in whom the estate has vested of their proprietary rights' (p. 827) and then specifies four exceptions to this rule. It is submitted with great respect that the Privy Council decision is most unsatisfactory and does not correctly interpret the words of the *Mayūkha* and the spirit underlying it. The *Mayūkha* is here explaining the words of *Yasajñā anyatrānujñāid-bhātuh* and is obviously combating the view of the Benares lawyers represented by Nanda Papdita (vide p. 116 n. 2 above) that a widow cannot adopt at all or without an authority from the husband. But there is nothing to show that he establishes the proposition that even a widow in a joint Hindu family can adopt not only without authority from her husband but also without the authority of (and even against the wishes of) her husband's undivided father or brothers. The noble Lords say 'The *Mayūkha* and the *Kaustubha* which govern the Mahratta school regard adoption by a widow as a religious duty which does not require the authority either of the husband or of his kin men' (35 Bom. L. R. 200 at p. 200). But this is entirely wrong since the *Mayūkha* expressly says, (p. 117 ll. 4-5) in the case of a widow adoption takes place even without it (i. husband's permission) 'with the assent of the father and failing him with that of the kinsmen'. The Privy Council ignores these words of the *Mayūkha* and also forgets what *Hātāvāna* (quoted by the *Mayūkha*) expressly says about the widow engaging in religious acts without permission. Vide *Siddappa v. Sengangaouda* 16 Bom. L. R. 663 and *Leakadabai v. Lamchaudra* 22 Bom. L. R. 1320, where *Payappa's* case has been followed, but see *Sengangaouda v. Hanumanthgouda* 33 Bom. L. R. 1215 (where it was held that if a person dies leaving his widow and a son and that son dies leaving a widow the power of the mother to adopt is at an end and cannot be revived even by the consent given by the son's widow) and *Shirappa v. Ilirava* 31 Bom. L. R. 532.

The above is said in the *Mitākṣarā*¹ It is proper to hold that this is the purpose of this text, since any other purpose is impossible *Durebāndhavam* (in *Vasistha*) means 'one of another caste'

My' venerable father says that even one who is married or who has had sons may be taken in adoption. And this is proper, since there is nothing opposed (to this view)

As regards (the verses of) the *Kālikāpurāṇa* :

' Oh king,² that son, whose *samskāras* (purificatory ceremonies) up to (i. e including) *cūdā* (tonsure) have been performed with the *gotra* (family name) of his (natural) father, does not (i. e cannot) attain the status of the (adopted) son of another. When the ceremonies of *cūdā*, *upanayana* (investiture with the sacred thread) are performed under his own *gotra* (by the adoptive father), the *dattaka* and the other kinds (of sons) become (recognised as) sons in the adoptive family, otherwise they are called *dāsa* (slave) Oh king ! after the fifth year (from birth) the adopted sons and the rest cannot be (recognised as) sons. Having taken (in adoption) one who is five years old one (the adopter) should first perform the *putreṣṭi*³

1. The *Mit.* on *Yāj.* II. 182 after quoting *Manu* 9 182 says that the text is meant to forbid the adoption of another when it is possible to adopt a brother's son and that the text does not lay down that a brother's son is one's 'own son for all purposes, as such an hypothesis would be opposed to the rule laying down that one's widow, daughter and daughter's son succeed before a brother's son.

2. This passage of the *Kālikāpurāṇa* is quoted in *Gangasahāi v Lekhraj* 9 All 253 at p. 306, where also the two translations of Sutherland and Colebrooke (of this passage) are set out and that of Sutherland approved. At p 316 the comment of the *Mayūkha* about the passage being of doubtful authenticity is quoted and it is held that the authenticity of the passage is extremely doubtful (p 318) In *Raja Mukund v Shri Jugannath* 2 Patna 463 at p 477 the passage of the *Kālikāpurāṇa* is referred to and it is held that a boy may be adopted till his *upanayana* and that it does not matter if the *Cūdā* ceremony is performed in the family of birth and that *putreṣṭi* is omitted at the time of adoption. Vide also *Chandreshwar Prasad v Bishehwar Pratap* 5 Patna 777 at p 844 (where the passage of the *Kālikāpurāṇa* as to five years was held not binding)

3. These verses of the *Kālikāpurāṇa* state four propositions, viz. (1) if all *samskāras* from *jātakarma* to *cūdā* (i. e including *cūdā*) have been performed in the family of the birth, that boy cannot be adopted in another family, (2) if a boy's *cūdā* and later ceremonies are performed in the adoptive family he is fully an adopted son, (3) a boy over five years of age cannot be adopted at all, (4) a boy up to five years (but not more) whose *cūdā* was performed in the family of birth may be adopted, provided the *putreṣṭi* is performed first before any other *samskāras* are performed in the family of adoption. The *cūdā* was performed generally in the third year and the tufts on the head were kept according to the *pravara*. Vide *Manu* II 35, *Āp Gr.* S VI, 16 3, 6-7 and notes to V M p 187. According to *Pāṇini* (II 1 13) *ā* is used in the sense of exclusive limit (*maryādā*) and inclusive limit (*abhiyādhī*) Vide notes to V. M p. 188 for the conflict if *ā* were taken in the sense of *maryādā*. Nil. says that these verses apply, if at all, to the adoption

* P. 114 (text).

That passage refers to one who is not of the same *gotra*. In the word *śūdrāntam* *ā* is used in the sense of inclusive limit since if it were taken in the sense of exclusive limit there would be conflict with the verse when the ceremonies of *śūdrā* and *upanayana* to. This text however should not be much relied upon since it is not found in two or three copies of the *Kālikāpurāṇa*.

The *dattaka* (adopted) son is moreover of two sorts, *kevala* (simple) and *dvyāmṣyāyana* (the son of two fathers) The former is one who is given with out any condition while the other is one who is given with the condition this son belongs to us both ¹ Of these the former should perform the obsequial rites, *śrāddhas* and the like of the adopter alone (and not of the natural father) To explain The acceptance (the ceremony of) adoption) of a son requires a *bhārya* (the goal to be accomplished) to be

of a boy who is not of the same *gotra*. His real view is that these verses are without authority and probably spurious. In *Dharma v Ramakrishna* 1 L. R. 10 Bom 80 it is said (at p 84) that Nīlakaṇṭha's interpretation of the *Kālikāpurāṇa* passage as referring to *aśogotra* boy causes a difficulty but it does not, we think, follow that because he explains the text and comments upon it, he therefore adopts it At p. 84 the conclusion reached is we must hold therefore that the adoption of a married *aśogotra* brāhmaṇa is not prohibited by the Hindu Law in force in this presidency In *Kulgauda v Somappa* 33 Bom 669=11 Bom. L. R. 37 (where a married Hindu having a son was given in adoption) it was held that he alone passed into the adoptive family and that his son born before adoption remained for purposes of inheritance in his natural family In *Adri v Fakirappa* 42 Bom 517 it was however held that a son who was in the womb when his father was adopted passed into the adoptive family with his father In *Varadagava v Ramalingu* 2 Mad. 148 (F. R.) it was held that (in South India) a brāhmaṇa of the same *gotra* may be adopted after *upanayana* but before marriage. *Lingappa v Chakragammal* 48 Mad 407 holds following the *Dattaka-candrikā* that even a *śūdra* cannot be adopted after his marriage.

1 Some writers (such as Mandlik, Hindu Law p. 503) were of opinion that the *dryāṃṣyāyana* form had become obsolete. But decisions of courts hold otherwise. In *Darda v Lingagauda* 12 Bom 423 at p 407 Justice J was not inclined to hold that the *dryāṃṣyāyana* son was obsolete in this age in the southern parts of the Bombay Presidency In *Srimati Uma Devi v Golakdas* 6 I. A. 40 (= 3 Cal. 567) this form was recognised and it was said (at p. 51) to constitute a *dryāṃṣyāyana* there must be special agreement between the two fathers In *Chandra v Basangauda* 21 Bom 105 it was held that the practice is prevalent among *Lingayats*. In *Varadaram v Secretary of State* 11 Mad. 187 it was held that on the Malabar Coast among the Nambudiri brāhmaṇas the *dryāṃṣyāyana* is the ordinary form of adoption The power of adopting in this form is not confined to brothers but may be exercised by their widows (vide *Arusha v Paramashri* 25 Bom 53 = 3 Bom L. R. 73) In *Laxmipatras v Lakshmi* 41 Bom. 315 (= 12 Bom L. R. 23) it is said that whether it is a brother's son or any one else that is adopted an express stipulation that the boy is to be the son of both is necessary (at p. 331 the passage of the *Māyūkha* is quoted) Vide also *Huckrao v Jhismarao* 42 Bom 377 (= 20 Bom. L. R. 101) In *Dehari Lal v Babu Lal* 26 All. 472 the natural mother of the *dryāṃṣyāyana* son was preferred as an heir to a *bandhu* of the adoptive father In *Basappa v Garali gaud* 33 Bom. L. R. 3 it was held that on the death of an unmarried *dryāṃṣyāyana* adopted son his adoptive mother and natural mother both inherited as heiresses.

stated and (therefore) in the passages prescribing that (the adoption of a son) such as ' one about to take a son in adoption ' &c (Vasistha Dh S 15 6), the son is stated to be the *bhāvyā*¹ by the word ' putram ' being used in the accusative case. And it is not possible (in the case of adoption) to cause a son to be in the same sense in which a male child is born. Therefore by the word ' putra ' (in Vasistha's text and similar ones on adoption) all the purposes served by a son are to be figuratively understood and the adṛṣṭa (the unseen result) that urges one to perform that (act of adoption) must be accepted as the *bhāvyā* (in the passages laying down adoption). Therefore (on the adoption taking place) those actions² which spring from such special relationship as that of father and son take place in the adopter's family (so far as the adopted boy is concerned). Therefore is it that Manu (9 112) says²

1. *Bhāvyā* literally means ' what is to be made to exist or what is to be caused to be '. As we say ' yāgeṇa svargam bhāvayet ' (one should cause svarga to be by means of sacrifice), where the goal to be accomplished (svargam) is put in the objective case, so in Vasistha's text *putram* is in the objective case and is the *bhāvyā* of the rite of adoption. But the boy to be adopted already exists, he is not to be brought into existence literally. Hence the word ' putram ' is to be taken in a figurative sense as indicating all the purposes served by a son (i.e. paying off a debt, freedom from *put* hell &c). When we cannot take the expressed or literal sense (s'ākṣya or vācya sense), *lakṣya* sense is to be taken. Therefore what is meant is ' by the ceremony of adopting a son one should accomplish the adṛṣṭa (the unseen results) to be secured by means of a son '. The promise of heaven in the Vedic texts prompts a man to perform a sacrifice and so the latter is said to be the *prayojaka* (what incites or prompts to an act). Similarly the *adṛṣṭa* brought about by the adoption of a son is the *bhāvyā* and the *prayojaka* of the ceremony of adoption. Vide notes to V. M. pp. 188-189.

2. Manu IX 142 and Nīlakaṭṭha's explanations of *pinda* and *śādhū* are quoted in *Lallubhai v. Manjorebar* I. L. R. 2 Bom 398 at p. 121 and at pp. 125-126 it is proved by quotations from the Samskāramay ūkha that Nīlakaṭṭha accepted Viṣṇuśara's explanation of the word *śapinda*. In *Sri Rajah Venkata Narasimha v. Sri Rajah Itangayya* 29 Mad. 437 at p. 442 the words of the May ūkha from ' therefore is it that Manu says ' up to ' co-extensive with the two ' are quoted and it is said ' we do not think that there is anything in these passages which necessarily carries with it the idea that the adopted son is divested of property which is his own absolutely at the time of adoption '. In *Dattatreya v. Govind* 40 Bom. 429 (where a person in whom property had become vested as the sole surviving male in the family was given in adoption into another family) it was held, dissenting from 29 Mad. 437, that a person on adoption lost all rights to the property of his natural family that had already become vested in him before adoption. At p. 438 the verse of Manu is translated and it is said (at p. 434) ' there is no room for the distinction that the prohibition against taking is confined to the inheritance after the adoption and does not extend to what is already inherited before adoption. The words are wide enough to include the estate vested in him at the time of his adoption, provided it is the estate of his natural father. ' It is submitted with great respect that this Bombay decision is wrong and is opposed to two Mīmāṃsā rules of interpretation, viz. about *vāhyabheda* and about *bhūta* (already existing things or facts) and *bhavya* (futuro things or state of facts). Vide above p. 112n 1 and p. 121n 1 for the latter maxim and pp. 37, 38 of my ' Brief Sketch of the Pūrva-mīmāṃsā system ' for an exposition of how these faults are committed by the Bombay decision. In 29 Mad,

¹ P. 115 (text).

The son given shall not have (*ahare*) the family name (*gotra*) and the wealth (*riktha*) of his natural father, the *pīṇḍa* (the cake offered to deceased ancestors) follows the family name and the wealth of him who gives (his son in adoption) the *śvadhā* (the obsequies) cease (so far as that son is concerned)

Gotra-rikthānugah (in Manu) means that follows the *gotra* and *riktha* (estate) i e it is generally co-existent with the two (*gotra* and *riktha*) *Dattima* (in Manu) means the simple (*kevala*) adopted son since it will be stated later on that in the case of the *dvyānupādāna* the family name (*gotra* of the natural father) and the rest do persist

43* at p. 440 one of the Mīmāṃsā doctrines appears to be tacitly employed. The Bombay decision in *Mahabharata v Subramanya* 47 Bom 512 (= 25 Bom L. R. 274) seems to be opposed in principle to the decision in 40 Bom 422. In 47 Bom 512 where a father and his four sons partitioned family property and then one of the sons was given in adoption to another person, it was held that the son so adopted was not divested by the adoption of the property he took on partition. In *Shyamcharan v Shricharan* 50 Cal. 1185 it was held following 30 Mad. 43* that a man who had inherited property from the family of birth was not divested of it on being subsequently adopted by another man. In *Manikbat v Golwidas* 42 Bom 520 (= 27 Bom L. R. 414) it was held that where a person, who is the sole surviving coparcener in his natural family and has a daughter then living, is adopted into another family his estate in his natural family vests in his daughter on his adoption. This case refers to both 40 Bom 422 and 47 Bom 512 with approval. It is extremely difficult to reconcile the three Bombay cases. In *Raghu Ray Chandra v Subhadra Kulkarni* 55 I. A. 189 at p. 118 the case in 40 Bom 422 is apparently cited with approval, but in a different connection. Vide 50 Cal. 1185 at p. 1185. In the very recent case of *Das Kesari v Shirsangji* 81 Bom L. R. 1832 Patkar J. in an elaborate judgment holds that 40 Bom. 422 was correctly decided and follows it. At p. 1810 the verse of Manu is quoted and translated (the reading *na haret* being accepted as meaning *shall not take*) at pp. 1811-12 the gloss of the Mayūkhya on that verse is quoted and on p. 1812 the conclusion is reached that the *gotra* so (i e by birth) vested in the son ceases after the son is given in adoption. The *gotra* and *riktha* (the estate) are inextricably joined together in a *dvandva* compound and it would follow logically as well as grammatically that the adopted son must lose both together and cannot lose the former and keep the latter. The learned judge does not however meet the two objections based on the Mīmāṃsā stated above nor does he correctly understand the Mayūkhya. The Mayūkhya does not make a sweeping assertion that all connection of the son given in adoption with the family of birth ceases. All that the Mayūkhya says is that the verse of Manu is not to be taken literally but that it indicates the cessation of all those consequences that are due to connection with the *pīṇḍa* in the case of the *pitṛat* father and the rest. The Mayūkhya does not expressly say anything about the cessation of property already taken nor about the cessation of the *gotra* for purposes other than the *pīṇḍa*. As a matter of fact the *gotra* of the natural family has to be considered even after the adoption of a boy in another *gotra* for purposes of marriage. The same learned judge in the same case observes the simple adopted son is not competent to marry within the prohibited degrees either in the natural family or in the adoptive family. The *śaṅkha* is still applicable therefore for cognation in both the families for the purpose of prohibition of marriage. *Isaaya v Anandji* 30 Bom L. R. 50 at p. 50. Thus there is no *svadhā* and *śvadhā* in the case of *gotra* on adoption for all purposes, but only for those purposes in which the *pīṇḍa* (rice-ball) enters. If that is so a *gotra* there is no *svadhā* in the case of *riktha* also though it is not to be a qualified cessation viz. as to inheritance falling in after adoption.

(even after adoption), *Pinda* (in Mann) means, according to Medhātithi, Kullūka and others, *s'rāddha* and the rites after death. Others say that *pinda* means the *sapinda* relationship and *svadhā* means obsequial rites, *s'rāddha* and the like. Really speaking, just as in the text 'one who has male issue and whose hair are black may consecrate the sacred fire' a particular stage of life (age) is indicated (and the words are not to be taken literally) or just as in the passage 'he (the priest) measures half outside and half inside the vedi (altar)' a certain region (for planting the sacrificial post) is indicated, similarly¹ here also (in Manu 9 142) the words *gotra*, *riktha*, *pinda* and *svadhā* indicate all consequences whatever in relation to the natural father and the rest that are brought about by (their) connection with the *pinda* and this passage conveys (by those words) the cessation of all those (consequences). From this follows also the cessation of the relation (of the boy given in adoption) to his full brothers, paternal uncle and the rest. Therefore² also the son born of the *kevala dattaka* (simple adopted son) should perform the *sapindā-karana*, the *pārvanas'rāddha* and the like 'rites of his father (who was adopted) in conjunction with the adopter alone (and not with the natural father)'. Similarly his son also (i e the grandson of the adopted man)³

1. The passage of the Mayūkha from this place to the words 'paternal uncle and the rest' is quoted in *Laxmipatirao v Venkatesh* 11 Bom 915 at p. 330 for the proposition that the connection of the adopted boy with the natural family is severed except for marriage up to certain degrees. In *Padma Coomari v Court of Wards* 8 I A 229 at p. 216 it was held that an adopted son succeeds lineally as well as collaterally and in *Kali Komul v Umashankar* 10 I A 198 it was held that an adopted son succeeds to the brother of his adoptive mother, vide *Dattatraya v Gangabai* 46 Bom 511 for a similar proposition. But in *Bhau-sahib v. Ramgauda* 25 Bom L R 818 it was held that a person who is adopted into another family cannot succeed to the property of his maternal grandfather in his natural family.

2. This sentence is quoted in 11 Bom L R. 797 at p 800 (=38 Bom 669)

3. Nilakantha does not approve of the literal and forced interpretations of *pinda* and *svadhā* given by others. Nilakantha as is often the case cites two illustrations from the Pūrvamīmāṃsā. Consecration of sacred fires is enjoined in such Vedic passages as 'a brāhmana should consecrate fires in spring &c'. There is the passage 'one who has had sons and who has black hair &c'. As consecration of fires has already been ordained, this passage only prescribes some detail about it. If the passage be construed literally as laying down both conditions (having sons and having black hair), there would be two *vidhis* in one sentence (i e there would be *vāhya-bheda*) which is a blemish (vide above p 121n 2). A man may have no son till his hair turns grey and then he cannot consecrate fires if the literal sense were taken. So by *lakṣanā* (by indication) all that the two words mean is that vigorous manhood is the time for consecration of fires (i e one must not be a mere youth nor old). *Lakṣanā*, which is only a fault (if any) of words is to be preferred to *vākyā-bheda* which is a fault of sentence. Similarly the words 'he measures half inside &c' are not to be taken literally, but only as indicating the region where the post is to be planted. Vide Jaimini III 7 13-14 and notes to V M pp 190-191. So in Manu's verse the words *pinda*, *svadhā* and the rest are not to be taken literally. There is on adoption not only severance from the natural father as regards *gotra*, estate, *pinda*, but there is a severance for all purposes with the natural father's family. *S'rāddhas* are subdivided in

After starting the topic of *dvyāmusyāyana*s (sons of two fathers) with the words Now if sons whether adopted purchased or born of appointed daughters (*putrikā*) become devoid of *pravara* (i.e. lose the *pravara* and therefore the *gotra* they had by birth) on account of their being accepted by another (as his) they become *dvyāmusyāyana*s as to what *Kātyāyana* (then) says¹ if they (those who take *dattaka* &c.) have no issue born of their wives then these (sons *dattaka* purchased, *putrikāputra*) shall take the estate and offer *piṇḍa* to them up to three ancestors and if both (the person taking and the person giving) have no issue, they (the *dattaka*, the purchased, the *putrikāputra* &c.) shall offer (*piṇḍa*) to both, in one and the same *sṛāddha* he (the son adopted purchased &c.) should repeat both the giver and the taker after having separately intended (the same *piṇḍa* for both) up to the third ancestor that has reference to the *dvyāmusyāyana* (and not to the simple adopted son), since* the opening words are they become *dvyāmusyāyana*s. Therefore the *dvyāmusyāyana*, when the natural father or the adoptive father has no other son should offer the *piṇḍa* to him and take the estate, but not when another son exists when however both (the natural father and the adoptive father) have *aurasa* (legitimate) sons he (the *dvyāmusyāyana*) should give *piṇḍa* to none (of the two fathers) and should take a fourth part of the share that belongs to the *aurasa* son of the adopter since *Yasajñha* (15.9) says if after a son is taken in adoption on *aurasa* (son of the body) be born he (the adopted son) shall be the recipient of a fourth share and since *Kātyāyana* says

various ways. One division is into *pūrvana* and *ekoddīya*. *Pūrvana sṛāddha* is one that is offered on a *pūrvana* i.e. on *amāvāsyā* (new moon) full moon &c. It is performed with special regard to three paternal ancestors with whom are associated the wives of the three paternal ancestors and the three male ancestors of one's mother and their wives also are invoked in this *sṛāddha*. The *ekoddīya* is performed for a single person. *Sapindikarūpa* is a rite performed for a deceased person at the end of a year from death or on the 12th day from death whereby from being a *preta* he is raised to the position of a *pitr* and shares the rice cakes along with the ancestors. The son of the *leśa* *dattaka*, according to *Nīlakaṇṭha* is to offer in the *pūrvana* &c. *piṇḍa*s to his father the adopted man to the adopter alone (as his grandfather) and to the adopter's father but not to the natural father (of the adopter) and the latter's father. Similarly the grandson of the *leśadattaka* offers *piṇḍa*s to his father (son of the man adopted) his grandfather (the man adopted), and to his great-grandfather (the person adopting) but not to the natural father of the man adopted, though the latter also is in a way a great-grandfather.

1. This passage is variously read by *Hārādatta*, *Bhaṭṭoji* and others. When offering one *piṇḍa*, the *dvyāmusyāyana* was to intend it both for the giver and the adopter whom he was to repeat, the second for the father of the giver and of the adopter and so on. According to some writers two *piṇḍa*s were to be offered to the giver and the adopter separately two to their fathers and two to their grandfathers. Vide notes to V. 31 pp. 124-124. In a well known verse several means for arriving at the correct purport of a *pāṇini* are laid down viz *apākrama* (opening words) and *apavāṇī* (concluding words) *abhyāsa* (repetition) *apūrvā* *piṇḍa* *arthavāda* and *apavāṇī*. *Nīlakaṇṭha* has written on the first means (*apākrama*).

If an *aurasa* son be born, the (other kinds of) sons take the fourth share, provided they belong to the same caste; but those (secondary sons) who do not belong to the same caste (as that of their father) are entitled to food and raiment (alone)

The reading of the *Kalpataṛu* is ' take the third share '. *Vijñāneśvara* says ¹ that ' *śavarṇāḥ* (in the verse of *Kātyāyana*) means ' the *hsetraja*, the *dattaka* and the like '. When both (the adopter and the giver of the *dyvāmuṣyāyana*) have no (other) son, he (the *dyvāmuṣyāyana*) should perform a single *s'rāddha* only for both (giver and adopter) in the manner already declared above in the words ' in one and the same *s'rāddha* &c ' As to what *Kāśnājini* (quoted) in *Hemādri* says ²

Whoever may be the members belonging to the respective families of the fathers (natural and adoptive), the adopted sons and the rest should perform their conjunction (*sapindikarāna*) on their death with the *pitṛa* in the respective families (of birth or adoption) The sons of them (of the *dattaka* and the rest) should perform (the *sapindikarāna*

1. The *Mit* on *Yāj* II 132 gives this explanation of *śavarṇāḥ* and explains *śavarṇāḥ* as ' *lānina*, *gūdhaja*, *śāhodha*, and *pranarbhava* '

2. These verses have been variously explained by *Kamalākara*, *Hemādri* and others. Vide notes to V M pp 191-197 for detailed explanation. The *sapindikarāna* of a deceased person is always made with reference to his three immediate paternal ancestors. If a person dies in the natural father's or adoptive father's family of the *dattaka* and he has to perform the *sapindikarāna* of that man then he (the *dattaka*) should associate the deceased with the latter's three ancestors. If the *dattaka* is himself dead, his *sapindikarāna* has to be performed by his son with the three ancestors of the *dattaka*, father, grandfather and great grandfather. But he had two fathers (natural and adoptive). So in the place of the father of the *dattaka*, two names (of the natural and adoptive fathers) are to be repeated when offering the *pinda* for the father of the *dattaka*. If the grandson of the *dattaka* has to perform the *sapindana* of his own father (i.e. of the son of the *dattaka*), then the *dattaka* will be the father of the deceased and the grandfather of the deceased would be the natural and adoptive fathers of the *dattaka*. *Nīlakantha* says that it is only the natural father of the *dattaka* whose name is to be taken as the grandfather (when the deceased is the son of the *dattaka*). When it is the great-grand son of the *dattaka* who has to perform the *sapindana* of his deceased father (i.e. of the grandson of the *dattaka*), the father of the deceased is the son of the *dattaka*, the grandfather is the *dattaka* himself and the natural and adoptive fathers of the *dattaka* occupy the place of great-grandfather. The question is whether in the *sapindana* of the grandson of the *dattaka* by the great-grandson, both names are to be repeated with reference to the *pinda* for the great-grandfather. The answer is that there is an option, viz. the name of the natural father of the *dattaka* must be taken as the great-grandfather of the deceased grandson of the *dattaka*, but the name of the adoptive father of the *dattaka* may or may not be taken with reference to the *pinda* for the great-grandfather. The words ' *esā tripauruṣī* ' are capable of several meanings. According to *Nīlakantha* they seem to mean that the relationship due to *pinda* extends only up to three generations i.e. the adopted son, his son and grandson are connected with the adopter by *pinda* relation, but the great-grand-son of the adopted person is not so connected with the adoptive father.

of the *dattaka*) with two (natural and adoptive fathers) while the grand sons of them (of the *dattaka* and the rest) should perform (the *sapindi karana* of their father the son of the *dattaka*) together with one (i. e. the *dattaka*) . As regards the fourth generation (i. e. the great-grand son of the *dattaka*) there is an option. Therefore this *piada* relationship extends to three generations only . *On days (such as new moon) common (to all deceased ancestors for performing *śrāddha*) there is no distinction as regards members of the groups (of the dead on the natural father's side or the adoptive father's side) but on the day of the anniversary of death they (the *dattaka* and the rest) should perform according to the prescribed rules the *śrāddha* with reference to one (deceased person) only .

that also has the same import as the text of *Kātyāyana* (discussed above) . The meaning is as follows . The *dvyāmṣyāyana* adopted son and the like should perform the *sapindikarāṇa* of persons dying in the families of their natural father and their adoptive father with members of their own group viz. their fathers and the rest, but the sons of the adopted son and the like should perform (the *sapindikarāṇa*) of the latter in conjunction with both the natural and adoptive fathers . The grandsons of them (of the *dattaka* &c.) also (should join) their (deceased) father with the *dattaka* who is their grandfather and with the natural father of the *dattaka* (who is their) great-grandfather . *Caluriḥ puruṣ* (as to the fourth generation) means as regards the great grandson of the *dattaka* . *Chandah* means volition . (The meaning is that) the great-grandson of the *dattaka* performing the *sapindikarāṇa* of his own father i. e. a grandson of the *dattaka* may repeat the name of the adoptive father or not, but he must repeat (or invoke) the name of the natural father (of the *dattaka*) . At the new moon and other times that are *śāthārāṇa* (common i. e. when one may perform a *śrāddha* for all ancestors &c.) *śrāddha* should be offered to members of the families of the natural and adoptive fathers while on the day of the anniversary of death a *śrāddha* called *ekoddyā* should be performed with reference to one (deceased) person only .

Some however say that there is no such thing as a *kṣvaladattaka* (a simple adopted son) because there is no text containing a positive injunction about him and further that since there is no text positively prescribing the condition this son belongs to us both a son taken (in adoption) even without such a condition is still a *dvyāmṣyāyana* and that by him two *śrāddhas* or one *śrāddha* intended for both the natural and adoptive fathers should be performed on the day of the new moon and the like while the son of him (of the adopted man) should perform the *sapindikarāṇa* and the *pārcana-śrāddha* and the rest for the adopted man (when dead) in conjunction with both the natural and the adoptive fathers .

and that the same holds good with reference to the son of that (son of the *dattaka*) This requires consideration (i e this is not quite correct) Although the *kevaladattaka*¹ has not been mentioned anywhere expressly by that very word, yet he (the *kevaladattaka*) does follow (is established as a separate entity) by implication from the fact that the text of Manu (9. 142) already mentioned declares the cessation of all connection (of the son given in adoption) with the natural father and others and that this (cessation of all connection) is wanting in the case of the *dvyāmusyāyana*.² Moreover, the text of Gautama (Dh. S 4 3) (one should marry a person who is) ' beyond the seventh from out of the relations of the father and of the actual procreator and beyond the fifth from out of the relations of the mother ' lays down a prohibition of marriage up to the seventh degree in the family of the procreator, which (prohibition) would be superfluous as regards the *dvyāmusyāyana*, since in him there does exist (according to all writers) sapinda relationship (with the procreator) Hence in order to give this (passage of Gautama) its full meaning (or purpose) the (existence of the) *kevaladattaka* (as separate from *dvyāmusyāyana*) must be admitted, since as regards him the cessation of the sapinda relationship is declared (in the text of Manu) And moreover there is a conflict between the following (verse) from the *Pravarādhhyāya*³.

1 The passage from this line to the sūtra of Gautama and the comment thereon is referred to in *Ramangauda v Shvagr* (1876) P. J p 78 for the proposition that the marriage of a brāhmaṇa with his sister's daughter is void on the ground of sapinda-ship in the absence of special custom

2. Nil. is quite right here His argument is that when Manu speaks of complete cessation of connection with the natural father he is speaking of a kevala dattaka, though he does not use that word, since all texts are agreed that as regards the *dvyāmusyāyana* there is no such complete cessation.

Gautama's sūtra is similar to what Yāj (1 58) and Manu (8. 5) say , Gautama, however introduces the word ' bijnah ' after the word ' pitr bandhubhyaḥ ' In ancient times there were several secondary sons, such as *ksetraja*, *putrakūputra* &c Therefore it was possible to find that one person was in law the father of a person, while the actual progenitor was another, as e g in the case of *niyoga*, the son born of a woman belonged to her husband, while the actual procreator (*bījin*) might have been the husband's brother, or *sagotra* or some one else Therefore Gautama laid down that prohibition on the ground of sapinda relationship in marriages extended up to seven degrees on the legal father's side as well as on the procreator's side It is however not easy to see how this sūtra helps Nil in establishing the existence of *kevala dattaka* Gautama is not laying down here a new rule unknown from another source, He simply summarises the rules deducible from the practices of the *śiṣyas* of his day and therefore this sūtra must be regarded as a mere reiteration, just as his sūtra about ownership was held by Nil to be a mere reiteration of what was well-known.

3 - In the S'rauta sūtras there is a chapter on pravaraś Whence this verse is quoted it is difficult to say. A man cannot marry a girl born of the same *gotra* as his Some *gotras* have only one *pravara*, some have three and some have five *pravaras* The *gotras* may be different, but one or more *pravaras* may be common to two *gotras* A man cannot marry a girl whose father's *pravara* is the same as his. *Pravaras* are those sages whose names are invoked by the sacrificer at the time of selecting priests at a sacrifice or

those who are *dryāmuyāyana*s such as those adopted or bought cannot marry in both *gotras* just as in the case of Sānuga-Sāis'iri

which declares that the *dryāmuyāyana* has both *gotras* and the verse of Manu (9 142) which declares (in the case of the adopted son) the cessation of the *gotra* of the natural father, this conflict can be removed only by (postulating) a distinction (of *dattaka*) into *kevala* (*dattaka*) and *dryāmuyāyana*. For these (three) reasons the (existence of the) *kevaladattaka* also is established

It is for this reason (i e on account of the distinction between *kevala-dattaka* and *dryāmuyāyana*) that after declaring on the strength of the text of Manu the cessation of *sapinda* relationship between Arjuna the son of Kuntī who was given as an adopted daughter to Kuntibhoja by Śūra and Subhadrā a daughter of Vasudeva son of Śūra and after declaring that this passage of Gautama (4 3) is merely concerned with the prohibition (in marriage) of even a girl born in the line of (*sandāna*) the procreator and after raising the doubt that Subhadrā was not fit to be married by Arjuna Bhaṭṭa Somesvara puts forward the explanation (refuting the doubt) viz the assumption of a distant relationship, which (explanation) was offered in the Vārtika¹ (viz the Tantravārtika of

they are, according to others, the ancestors of the founders of each *gotra*. Sāis'iris are a subdivision of the Kātas, who are a branch of the Visvāmītra *gotra* while the Sānugas are a subdivision of the Bhīradvāja *gotra*. On the wife of a Sānuga a Sāis'iri beget a son by *niyoga*. The descendants of the son so begotten came to be called Sānuga-Sāis'iris and they could not marry in both *gotras* viz Bhīradvāja and Visvāmītra. Vide notes to V M p. 122. The argument of Nīlakapiṭha is that the conflict between the verse from the *pravarūdhya* and that of Manu leads to the inference that they refer to distinct kinds of *dattaka* (i. e. there is a *vivayavyavasthā*) viz *dryāmuyāyana* and *kevala*.

1. Mandlik (p. 63) in his translation makes a mess of this somewhat difficult and involved passage. He had apparently no clue to what the Vārtika was and what Somesvara said. His translation by an explanation founded on a Vārtika text that there was no relationship (between Arjuna and Subhadrā) after the adoption is absurd. Mr. Chhapra (p. 80) follows him almost word for word. The Vārtika is the Tantravārtika of Kumārila and Bhaṭṭa Somesvara is the author of a learned commentary on the Tantravārtika, called *Nyāyavādhi* (or *Rāpaka*). The Tantravārtika enters into an elaborate discussion (pp. 128-138) about the lapses from good conduct attributed to ancient sages and epic heroes. The charge brought against Vasudeva (Arjuna) and Arjuna is that they married their own maternal uncle's daughters, Rukmīṭī and Subhadrā respectively, which is forbidden. From ancient times there was a conflict of views as to marrying one's maternal uncle's daughter. Baudhāyana (Dh. 8 1 1 17-21) says that this was practised by the southerners and condemns it himself. But some southern writers like Mīdhava and the author of the *Smṛticandrikā* defend the practice. Śūra had a son Vasudeva and a daughter Pṛthī. He gave Pṛthī in adoption to his paternal aunt, Kuntibhoja (Mahābhārata Adi 111 13). The son of Pṛthī (or Kuntī) was Arjuna. Subhadrā is spoken of as the daughter of Vasudeva and sister of Arjuna. Vide Adiparva 212 17-18. Arjuna married Subhadrā, who was thus his maternal uncle's daughter. If the texts are to be taken literally. But a maternal uncle's daughter is a very

Kumārila) As to what a writer says 'Somes'vara on the strength of Gautama's text declared that Kuntī had *sapinda* relationship for seven generations in the family of S'ūra also', that remark arises from not (carefully) studying the work (of Somes'vara). For, he (Somes'vara), having first referred to the cessation of *sapinda* relationship (on the strength of Manu), spoke of the text of Gautama as meant to prohibit (marriage) in the family of the progenitor, but not as conveying that there was *sapinda* relationship (of the adopted for seven generations in the family of birth)

Thus the two kinds (of adopted sons), *kevala* and *dvyāmusyāyana*, being established, the condition also 'this belongs to us both,' is established (in the case of the *dvyāmusyāyana*), since it has an evident (visible) purpose, viz. that the adopter may know that he (the son taken) is the son of two fathers

'And the simple adopted son (*kevala dattaka*) has *sapinda* relationship for seven generations in the family of the adoptive father (*pālaka-pitr*) and for five generations in the (adoptive) mother's family

near *sapinda* (being third from the common ancestor) Vide Yāj I 52-53 The answer of the Tantravārtika is that Subhadrā was not a real sister of Vāsudeva, but only his cousin, such as a maternal aunt's daughter. In popular language such a female cousin is called sister and Somes'vara notes that among the Lāṭas (people of southern Gujarat) that was the case in his day. This assumption of a distant relationship in Subhadrā to Vāsudeva (*sambandha-vyavadhāna-kalpanā*) is the explanation that Kumārila offers as against the charge that Arjuna married his maternal uncle's (Vasudeva's) daughter. Not being the real sister of Vāsudeva, she was not the daughter of Vasudeva. Some urged that Kuntī being given in adoption, there was cessation of her relationship with the family of her natural father S'ūra and his son Vasudeva according to Manu (9 142) and so her son Arjuna could very well marry Subhadrā even if she was the real sister of Vāsudeva and the daughter of Vasudeva and there was no necessity to assume that she was a cousin only. This view of some quoted by Somes'vara is referred to by Nil in the words 'after declaring the cessation son of S'ūra'. This view is met by the argument that, though Prthā was adopted by Kuntībhoja, still there is an express prohibition in the text of Gautama (4 3) about marrying one within seven degrees in the line of the procreator (S'ūra, the natural father of Prthā here) and so if Subhadrā were really the daughter of Vasudeva, she would be *bhṛāśantānaja* with reference to Prthā's son and would be ineligible for marriage (*aparineyā*) with Arjuna. All this is compressed in the words 'after declaring and after raising the doubt by Arjuna'. All this discussion serves the purpose of establishing that there are two kinds of *dattaka*, *kevala* and *dvyāmusyāyana*. Prthā was *kevala dattaka* and so it could be urged that there was cessation of *sapinda* relationship. The words of Gautama simply prohibit in express terms a marriage with one born within certain degrees from the progenitor (but they do not positively say anything about *sapinda* relationship). Somes'vara himself held the view that Subhadrā was only a cousin of Vāsudeva (i.e. he assumed with Kumārila that there was *sambandhavvyavadhāna*) and so Arjuna was not guilty of marrying a maternal uncle's daughter. Vide notes to V M. pp 193-204 where the relevant passages from Kumārila and Somes'vara are quoted,

* P. 119 (text).

As regards what Vṛddha¹-Gautama says —

Those sons, viz. the *dattaka* the son purchased and the like that were made so with the adopter's *gotra* become members of the *gotra* (of the adopter) by the rites (of adoption) but *sapinda* relationship (between the adopter and the adopted) is not prescribed (as arising from the rites) and as to what Bṛhan—Manu says —

Sons given purchased and the like have *sapinda* relationship with their natural father to the fifth and seventh² degrees but they take the *gotra* of their adoptive father as regards also what Nārada says —

Sons (secondary) are brought up in the respective *gotras* (of the adoptive fathers) just like (legitimate) sons for religious purposes they are intended to participate in the share (of property) and in the funeral cake only³

all these texts are without any authority⁴ (i.e. they are spurious or apocryphal) Even if they be authoritative, they serve the purpose of propounding that the *dayāmyāyana* has no *sapinda* relationship for seven generations in the family of the adoptive father since as regards the simple adopted son (*Levala-dattaka*) *sapinda* relationship for seven generations in the adoptive father's family has been declared by the text of Gautama (Dh. S. 4. 3) cited above and since by the text of Manu (9. 142) the cessation of *sapinda* relationship in the natural father's family has been declared

As regards the dictum of a respectable author in the *Sāpindyanirnaya* a boy (given in adoption) whose *upanayana* and other purificatory ceremonies (*samskāras*) were performed with the *gotra* of the natural father⁵ has *sapinda* relationship in the natural father's family for seven and five generations on the father's side and on the mother's side (respectively) and in the family of the adoptive father for three generations since in the adoptive father there is (in such a case) absence of the status of being the procreator and of the status of being the author of investing with the sacred thread which (two positions) bring about the status of being a *pitr* (father)⁶, while

1 This passage of Vṛddha-Gautama (and Mandlik's translation) is referred to in *Labul v. Girind* 1 Bom. L. R. 70 at p. 771 and the argument that *gotra* meant state of lineage was not accepted. The words *svagotrasa kṛtaye* may also mean who were adopted being of the same *gotra* (in their natural family) as the adopter's (*gotra*)

2 These words refer to the rule that *sapinda* relationship extends to seven degrees on the father's side and five degrees on the mother's.

3 The word only suggests according to the D. M. that there is no *sapinda* relationship with the adoptive father while according to the *Sāpindya-mīmāṃsā* quoted in the *Nirṇayasindhu* the word does not altogether negative that relation with the adoptive father but negatives it for seven generations.

4 *Ākaraṇa* means the original and authoritative works on a *śāstra* and *anākarāṇa* means not found in any authoritative work (like *Āperikā* &c)

5 One who initiates into Vedic study to which *Upanayana* leads is called *pitr* *Vide* M. no. II. 110.

P. 120 (text)

one (adopted), whose (upanayana and other) *saṁskāras* are performed with the *gotra* of the adoptive father has sapinda relationship only with the adoptive father and the rest for seven and five generations', we do not know on what authority (or source) this dictum is based ¹ And moreover, if the adoptive father has not the position of a *pitr* (father) on account of the absence of being the procreator and being the initiator into Vedic study (in the case of an adopted son whose *upanayana* was performed in the natural family), how is it that (it is said that) the *dattaka* has sapinda relationship (with the adoptive father) for three generations or how is it that he is to perform the *s'rāddhas* of the adoptive father and the rest ? Nor can it be said that being the *pitr* (in the primary sense) is necessarily co-existent with (or invariably concomitant with) sapinda relationship ², so that when there is absence of *pitr̥tva* (in the primary sense of being the procreator or the initiator into Vedic study), there would result the absence of *sapinda* relationship. As a matter of fact the *sapinda* relationship (of the adopted boy) with the adopter and the rest has already been declared by such texts of Gautama and the rest as ' beyond the seventh out of the father's relations ' (Gautama Dh S 4 3) This is the direction (i e this will suffice to elucidate this topic) ³

Now (begin) the rites of the gift and acceptance of a son All (men) that have several sons have the power to give (in adoption) only that son

1. The *Sāpindyanirnaya* is a work of S'rīdharabhattacharya, a paternal grand-uncle of Nilakantha One ms. of it in the Deccan College collection was copied in 1591 A D At the end of another ms (No 209 of 1882-83) it is called *Sāpindya-dīpikā* also On account of this relationship Nilakantha uses the plural and the word ' mānya ' (worthy of respect) with reference to the author. Vide notes to V M p 206 for quotations from the work.

2 This sentence is quoted in 36 Bom 339 at p 350.

3. In the words from ' if the adoptive father ' Nil argues against the dictum of the *Sāpindyanirnaya* The argument of the latter work is that a man is called a *pitr̥* either because he procreates the son or because he performs his *upanayana* (which is as if a second birth) If a boy is adopted after *upanayana* the adoptive father cannot claim to be a *pitr̥* of that boy in any one of these two senses, then Nil asks, why should the *Sāpindyanirnaya* yet say that there is *sapinda* relationship for three generations ? The *Sāpindyanirnaya* might reply that where the adoption takes place after *upanayana*, there is *pitr̥tva* in both ways in the natural father and so there is *sāpindya* with the natural father for seven generations and with the adoptive father only for three, as a *pinda* is to be offered only to three paternal ancestors Nil replies by saying that we cannot assert as an invariable proposition that where there is *pitr̥tva* there is also *sāpindya* That proposition fails in the case of the *kevala dattaka*, who, according to Manu, has no *sāpindya* with the natural father Nil further says that conceding for argument's sake that when a boy is adopted after *upanayana* is performed in the family of birth, the adopter is not his *pitr̥* in any of the two ways mentioned above, it would not necessarily follow that there is no *sāpindya* between them, since as shown above *pitr̥tva* and *sāpindya* are not invariably co-existent He says that on adoption there is the same *sapinda* relationship between the adopter and the adoptee, whether it takes place before or after *upanayana* is performed in the natural family.

who is not the eldest¹ while as regards accepting (a son) all to whom either no son was born or whose son is dead (have power) women whose husbands are alive (are entitled to adopt) with the permission of their husbands, failing husbands (women can adopt) with the permission of the (husbands) father and the rest² In the case of sūdras a daughter's son or a sister's son must be taken in adoption and not any one else, while by men of other classes a near *suptada* (should be adopted) failing him a remote *sapinda* (may be adopted) but not one belonging to another caste The donor on the day of adoption having recalled the time (the year month tithi &c.) and having made the *sankalpa* (the religious and solemn declaration) I shall make a gift of my son for bringing about a cessation of those various consequences that are due to the relationship of father and son and the like mutually subsisting between me and others (on the one hand) and this son (on the other) and for the creation of those various consequences due to the various mutual relationships such as that of father and son and the like between the adopter and others (of his family on the one hand) and this boy (on the other) "should perform the worship of Gages' *svastivācana* the worship of the *Mātṛs* and *Ṛddhivāddha*³ The adopter having observed a fast on the day previous to the day (fixed) for adoption having summoned his relatives on the next day (after the fast) having informed the ruler of the (intended) adoption of a son having recalled the time (year &c.) having made the *sankalpa* I shall adopt a son for bringing about the cessation of the various relationships of father and son and the like mutually subsisting between this boy who is going to be taken (in adoption) and his natural father and others and for⁴ the creation of those various consequences (or obligations) that are due to the various mutual relationships of father and son and the like between us and ours (on the one hand and this boy on the other) and having performed with (an appropriate) *sankalpa* (in each case) the worship of Gages' *svastivācana*, the worship of the *Mātṛs* *Ṛddhivāddha* the choosing of an *Ācārya* (priest for the ceremony) and the honouring of the *Ācārya* with ear rings two garments a turban *madhuparka*⁵ and the rest should feast three brāhmanas and his relatives Then the *ācārya* having made the *sankalpa* I shall perform my duties (in this rite) having performed the rites commencing with the marking out of lines on the altar and ending with the consecration of the fire (on the altar), having repeated (the texts) up to (including) *cakausi* *Ājyena*

1 In *Vyas Chintanī* v. 1 *vyas Samkhandra* 21 Bom. 367 at p. 877 Stok a translation all having sons may give in adoption one who is not the eldest is preferred to Mandlik a p. 63

2 This passage corroborates the criticism contained in p. 118 n. 1 of the deed done in *Ājyena* *śāstra* v. *Guruvāṅkanda* 35 Bom. L. R. 200 (1 C.)

3. For *svastivācana* and the *mātṛs* vide above p. 50 n. 1 and p. 48 The *Ṛddhivāddha* is performed when there is an addition to the family or on a joyful occasion (like marriage)

4 This clause is quoted in *Kaṭyāyana* v. *Saṁvṛtta* 11 Bom. L. R. 797 at p. 812.

5. *Madhuparka* was an offering of honey and curds made to an *Ācārya* after he is chosen for a rite or to an honoured guest such as a king son-in-law father-in-law maternal or paternal uncle &c.

at the time of placing fuel-sticks on the fire, and (having made the *sañkalpa*) 'I shall offer to Agni who is the principal deity in this rite, to Vāyu, the Sun, Prajāpati one oblation each, one oblation again to fire and six oblations of boiled rice to Sūryāsāvitṛī, and the rest to (Agni) Svistakṛt,' he should perform (all the rites) ending with *ājyotpavana*.¹ Then the adopter having gone near the giver should make a request (through the priest) 'give your son', while the giver, after reciting the five *ṛks* 'ye yajñena' (Rg X 62. 1-5), recalling the time &c and having repeated the words beginning with 'between me and others' (vide above p 132) and ending with 'for the creation &c' should declare 'I make a gift to you of this son who is decked with ornaments according to my ability'. Of the five verses (beginning with the words) 'ye yajñena', Nābhānedīstha the son of Mānava, all the gods, Jagatī (are respectively the seer, the deity and the metre) and they are employed in the rite of giving a son. The adopter, having accepted (the boy) with the words 'devasya tvā', having recited the psalm to Kāma² as laid down in his own sākḥā (recension of the Veda), having muttered the *ṛc* 'angād-angāt', having smelt the head of the boy, having decked him with clothes and the like, should take him inside the house to the accompaniment of auspicious music. Then the *ācārya*, having performed the rites beginning with the *ajyasthāpana* and ending with *ājyabhāga*³, and having offered oblations of clarified butter itself to the accompaniment of the *vyāhrtis* separately and together⁴, should then offer boiled rice* 'Yastvā hrdā' (is the *mantra*), Vasuśrut (is the seer), Agni (is the deity), Tristup (is the metre), its employment is in the homa with boiled rice that is the principal (rite) in the adoption of a son. (After repeating) 'Yas-tvā hrdā' (Rg V 4 10), the offering should be surrendered with the words 'this is for Agni, (it is) not mine' (now). Of (the *mantra*) 'tubhyamagre', Sūryā-sāvitṛī, Sūryā-sāvitṛī, Anustup (are respectively the seer, the deity and the metre) 'Tubhyamagre' (Rg. X 85 38), 'this is for Sūryā-sāvitṛī, it is not mine'. Of the five (mantras) 'somo dadat' (Rg X. 85 41-45) Sūryā-sāvitṛī, Sūryā-sāvitṛī and Anustup (are the seer, deity and metre). The employment is as before, 'Somo dadat'. Then he should finish (the *homa* to Agni) Svistakṛt. This is the (whole) rite (of adoption).

We return to the subject in hand. Kātyāyana states a special rule about the division of debts:

1 *Ājyotpavana* consists in purifying clarified butter by passing two kus'a blades through it.

2 Vide Ās'valāyana-s'rauta 5 13 and Āp. s'r s 14 11 2 for slightly differing *hāmastutis*.

3. *Ājyabhāgas* are two offerings made to Agni and Soma respectively to the north-east and south-east of the *āhavanīya* fire.

4 The *vyāhrtis* are the mystic syllables *bhūh*, *bhuvah* and *svah*. The offerings will be accompanied with these syllables as follows 'Om bhūh svāhā, om bhuvah svāhā, om svah svāhā, om bhūrbhuvah svah svāhā.'

* P, 122 (text).

The debt of the father the debt (incurred) in relation to (i.e. to pay off) the father's debt one's own debt and what is incurred by oneself these debts so incurred should always be cleared (provided for or paid off) on a partition with one's relatives (brothers &c.)¹

Pitryarnasambaddham means what is incurred for paying off the father's debt *Atmīyam* (one's own debt) means what is incurred by another for the maintenance and the like of one's family

The same author (says)

A debt contracted by a brother a paternal uncle or mother for the sake of the family should all be discharged by the co-sharers of the (ancestral or joint) estate at the time of partition.

As regards also the debt that is less than the *ṛakṣa* (ancestral or joint estate) the same author (*Kātyāyana*) says

Having paid the debts and what is promised (lit. bestowed) through affection, one should divide the rest²

Pradattam means promised *Nārada* (p. 197 v. 32) says

*What remains after (providing for) the gifts (promised) by the father and after paying off paternal debts should be divided by the brothers otherwise the father would remain debtor

Pitṛdāya (in this verse) means what is promised by the father The same author (*Nārada*) says

*What has been given (or promised) for religious purposes and what is donated through affection by the father and the debt incurred by him self—these and the visible estate should be divided There is to be no (other) payment out of the paternal estate (except the above at the time of partition)³

The meaning is whatever is given, that is whatever is promised to be given for religious purposes and out of affection whatever (debt) is contracted by the father himself (thus is the meaning of *svena yojitam*) such debts and the visible wealth should be divided there is to be no payment out of the paternal estate of anything beyond these debts (and obligations) Even when there is a suspicion of some (paternal wealth) being (not visible (i.e. not brought forward for division)) the same author (*Nārada*) says

Visible wealth (viz.) houses and fields quadrupeds (and the like), should be divided If there is a suspicion of (there being) concealed (joint) wealth an ordeal is prescribed in such a case Household utensils, beasts

1 This verse is quoted in *Penangga Pillai v. Pappurayyanar* 4 Mad. 1 (F.B.) at p. 49

2 This is quoted in *Penangga Pillai v. Pappurayyanar* 4 Mad. 1 at p. 49

3 This verse is variously interpreted. Vide notes to Y. III p. 200. Aparikṣita and Śrī G explain *svena yojitam* a meaning debt which the father repaid his wife's share to pay

of burden, milch cattle, ornaments and slaves, being visible, are divided
Manu has prescribed the *kos'a* ordeal as regards concealed (joint wealth)¹

Karmīnah means 'slaves and the like' Hence the very same author (Nārada) has laid down in the section on ordeals the restriction that *kos'a* alone is (the ordeal to be employed) as regards this matter

At all times when confidence has to be secured in case of suspicion (that joint estate might have been concealed) at the time of partition among co-sharers and when there are several persons on whom the burden of proof lies (in various ways) *kos'a* (ordeal) alone should be administered

Now (begins the treatment of) impartible property.

Manu (9 206) says

* Wealth, however, acquired through learning by a man, becomes his own (exclusive) wealth, and so are gifts from friends, gifts received on marriage or at the time of offering *madhuparka*.

Vyāsa says

Whatever is acquired through learning or valour and whatever is *saudāyika* (a gift from affectionate kinsmen), these belong (exclusively) to him (who acquires them) They should not be sought for (i e claimed) by his co-sharers at the time of partition (of joint estate)

Saudāyika will be explained (later on) And this (wealth) should be understood (as not liable to partition) when it is acquired without detriment to the paternal wealth

Thus also Yājñavalkya (II 118--119)² says

1. These verses and the next are ascribed to Kātyāyana in Aparārka, Sm. C. and other works

2. The verses of Yāj and the sūtra of S'ankha are quoted in *Visalatchi v. Annasani* 5 Mad. H. C R 150 at p 157 and the Mayūka is referred to at p 159 and it was held that the rule does not extend to property held by a title derived from the joint family and that the rule was intended to apply strictly to hereditary property of which the members of the family had been violently or wrongfully dispossessed or adversely kept out of possession for a long time. Vide also *Bajaba v Trimbak* 34 Bom 106 at p 110 for the text of S'ankha. The texts on *vidyādhana* (gains of science or learning) have been discussed in numerous cases of which the following may be referred to *Cholakonda Alsani v Cholakonda Ratnachalam* 2 Mad H C R 56, *Bar Mancha v Narotamdas* 6 Bom H C R p 1, *Pauliem v Pauliem* L R 4 I A 109 (=1 Mad 252), *Krishnaji v Moro* 15 Bom 32, *Vasantia v Anandrao* 6 Bom L.R 925, *Metharam v Rewachand* 45 I A 41=45 Cal 666 (which examines most of the previous cases), *Gokalchand v Hukamchand* 48 I A 162 (=2 Lahore 40) In *Lakshman v Jannabai* I L R 6 Bom. 225 it was said at p 243 'when they (texts) speak of gains of science which has been imparted at the family expense they intend the special branch of science which is the immediate source of the gains and not the elementary education which is the necessary stepping stone to the acquisition of all science' In 48 I A 162 at p 173 it was said 'From maintenance out of family funds during the period of education the basis of partibility changed to the receipt of the education itself at the family expense and then education generally was narrowed down to specialised education which is now the basis. No corresponding change is however to be traced upon the question what is science in the sense in which the text of the Mitāksharā uses the term' All doubts and difficulties as to gains of learning being partible or not have been removed by Act XXX of 1930 which makes all gains of learning the self-acquisitions of the acquirer.

* P 124 (text).

Whatever else is acquired (by a man) without detriment to paternal estate (viz) gifts from friends and on marriage that does not belong to the co-sharers. He, who recovers property descending hereditarily but snatched away (from the family) should not give it to (i.e. would not have to share it with) his co-sharers, as also what is acquired through learning

With regard to land descending hereditarily but recovered (by one co-sharer) Śaṅkha declares a special rule

If one (co-sharer) recovers land (descending) hereditarily that was at one time lost (to the family) the other (co-sharers) get it according to their respective shares after giving (to the recoverer) a fourth part

(The meaning is) after giving a fourth part of the recovered land to the recoverer they should divide the rest (equally) with the recoverer Mann (9 206)¹ says

Whatever a man acquires by his efforts without detriment to paternal wealth he should not give to his co-sharers nor what is acquired through learning

Vyāsa says

* That wealth which a man acquires by his own ability without relying upon (having recourse to) paternal estate he shall not give to (or share with) his co-heirs nor that wealth which is acquired through learning

Kātyāyana defines what is meant by vidyālabdhi (acquired by learning)

That wealth is said to be acquired through learning which is earned by means of learning acquired from another with the use of food (lit. boiled rice) belonging to a stranger²

The same author (Kātyāyana) elucidates this very matter

What is earned by learning when a matter has been propounded with a stake (before an assembly for discussion) is known to be 'vidyādhana' (gain of learning) it is not divided (among coparceners) at the time of partition. What is obtained from a pupil or from being an (officialing) priest or by (propounding) a question or by determining a doubtful point or by exhibiting one's own learning or by disputation (with an adversary) or by means of eminent study (or learning) is declared to be vidyādhana; it is not divided on a partition. This is the law applicable to artisans also as regards what is (given) in excess (by way of a tip or reward) of the proper price (of an article belonging to a family of artisans) What is acquired by learn-

1 The latter half of Manu 9.206 is different. The text seems to combine a half ver of Manu with another half verse from 3.8; cited above

2. This verse is quoted in *Durga Das v. Chandra* 52 All 303 at p. 312 and it is held that this definition is not exhaustive but only illustrative.

¶ 123 (text)

ing, what is made (i. e. acquired) from a pupil or from one for whom a sacrifice is to be performed are declared to be *vidyādhana*. What is acquired in other ways than these is common property (of all members of the family) Brhaspati says ' what is obtained by (superior) learning after vanquishing an adversary in a wager should be known as *vidyādhana* and it is not to be divided '. Bhrgu says ' what is acquired by (successfully) asserting one's learning, what is obtained from a pupil and what is earned on the analogy of a sacrificial priest (i. e. by making one's knowledge useful to another), (these) are (termed) *vidyādhana*.

Upanyāsa means, according to the Madanaratna, the recitation (of the Vedas) together in *krama*, *jaṭā*, and the like modes (of combination)¹. Some say that it means ' the expounding* of a knotty (abstruse) proposition in an assembly '. The construction is *panapūrvakam upanyaste* (when a difficult matter is propounded with a wager). *S'amsana* means ' making known (or announcing)', *prādhyaṇa* means ' excessive (or deep) study '. The meaning of the words ' *s'ūlpisvapī* ' is that this rule about learning is to be understood as applicable also to artisans, *mūlyādhikam* (beyond the proper price) means ' a reward ', *ṛtvīṇ-nyāya* means ' supervising '². Here in all cases there is impartibility only when there is no detriment to paternal estate in acquiring learning and in earning wealth by that learning, but if there is detriment (to paternal estate) then it (the wealth acquired by learning) does become partible. Hence is it that Kātyāyana says

Brhaspati says that that wealth is to be divided which is (acquired) by brothers that were taught learning in the family or (learnt it) from their father and which is acquired through valour (by such brothers so taught).

Even where there is detriment to the paternal estate, the acquirer does get a double share, since Vasiṣṭha (Dh. S 17 51) says ' out of these (brothers &c.) he who by himself acquired it should take a double share '. As regards a certain class of *vidyādhana* Nārada (p 191 v. 10) mentions a special rule :

He, who maintains the family of a brother while the latter is engaged in studying, should receive a share out of the *vidyādhana* (of that brother), though he was not promised (to that effect previously)

In the Madanaratna ' *as'ruta* ' is explained as ' devoid of learning ' ; but it is proper to explain it as one who was not promised ' I shall give a share '.

1 *Krama*, *jaṭā* and *ghana* are complicated methods of repeating the Vedas, each succeeding one being more complicated than the preceding. Vide notes to V M. p. 213

2. Or this may mean ' the word *ṛtvīṇ-nyāya* is only illustrative ' (i. e. includes similar things).

* P. 126 (text).

As regards (wealth) acquired without detriment to paternal estate Gautama¹ (Dh S. 28-28) mentions a special rule a learned man, if he chooses, may give to (his) learned brothers (a share of) the wealth acquired with his own efforts *Vaidya* (a derivative from *vidyā*) means one who possesses *vidyā* (learning) The meaning is that he may at his pleasure give (a share of his acquisitions) to his learned brothers. Kātyāyana says

Vidyādhana should in no case be given by a learned man to unlearned (brothers and other coparceners) but it may be given by a learned man to (brothers) who are his equals in learning or superior (to him). A* learned man need not if he is unwilling give a share out of his own (self-acquired) wealth to a learned (brother or other coparcener) if he did not acquire it with the help of paternal (i. e. joint family) property²

Madana says that this prohibition (contained in the first of the verses above) holds good if the brothers that are living possess other property but that in the absence of other property a share (in gains of learning) should be given to them also.

Bṛhaspati (p 381 v 78) declares the impartibility of what is bestowed as a gift by the father and the like

Whatever is given by the paternal grandfather and the father and also by the mother as well as wealth obtained by valour or on the occasion of marriage belongs to him (to whom it is given), it should not be taken away (at the time of partition)

Nārada (p 100 v 6) says

Both wealth acquired by valour and that acquired on marriage and gains of learning—these three are impartible, as also the favour (gift through favour) bestowed by the father

Kātyāyana says

What is *dhvajāhṛta* (snatched from a standard) is never understood to be partible What is seized in battle after putting to flight the enemy's army or after endangering one's life for the sake of one's master is termed *dhvajāhṛta*

The same author says

That is wealth gained by valour which is acquired when a master being pleased bestows a reward on a person who does a forceful act after endangering his life³

1 The printed Gautama reads differently A learned man may indeed not give to his unlearned brothers (a share of) the wealth acquired with his own efforts. This proposition is implied in the reading adopted in the text.

2. This last verse is Bṛada p. 121 v 11

3. Kātyāyana makes a distinction between *dhvajāhṛta* and *śaurya dhana* while other writers do not make it.

F 127 (text)

On this subject Vṛyāsa states a special rule,

Brothers are entitled to a share in that wealth which a man acquires by his valour after using some common (i. e. joint family) property such as a horse and the like. But he should be given two shares, while the rest are entitled to share equally.

Vṛyāsa¹ describes the nature of *saudāyika*.

That wealth is known to be *saudāyika* which is obtained by a married woman or a maiden from her husband or from the father's house (i. e. family) or from her brother or her parents.

Kātyāyana says:

What is obtained at the time of marriage with a maiden of the same caste, that should be known as wealth coming through a maiden. It is declared to be free from taint and productive of prosperity. That should be known as *vaivāhika* (due to marriage, nuptial) which comes (to a man) with his wife. All such wealth should be understood to be a means of securing religious merit.

What is acquired in the mode (described in the words) 'the *ārśa* form of marriage occurs on receiving a pair of cows' (Yāj. I. 59) is *kanyāgata* (wealth coming through a maiden)¹. Here also there is impartibility as in the case of gains of learning, if there is no detriment to paternal estate. But whatever is acquired in a mode distinct from learning and the like is indeed liable to partition. And so Manu (9. 205) says

But if all of them, not being learned, acquire wealth by their exertions (in agriculture, trade &c.), the division in that case will be equal, it being not (earned with help from) paternal estate; this is the established rule.

Thā (exertion) means 'work such as agriculture and the like', *apitrye* means 'when no help is received from paternal wealth'. Manu (9. 219) speaks also of other impartible property:

Clothes, vehicles, ornaments, cooked food, water (i. e. wells &c.), women, (wealth set apart for) *yoga* and *kṣema*, ways (or pasture lands) - these are declared to be not liable to partition.

‡ *Patra*² means 'vehicle'. Clothes, vehicles and ornaments belong to him alone who has worn (or used) them, provided they are of equal value.

1. This meaning of *kanyāgata* given by Nil. looks somewhat farfetched. His idea is that that wealth, such as a pair of cows &c. which is given to the bride's father in the *ārśa* form of marriage by the bridegroom's side, constitutes his self-acquired property. If the plain meaning of the words is taken, *kanyāgata* means that wealth which a bridegroom receives just at the time of marriage, while *vaivāhika* means whatever comes to him with his wife, even after marriage.

2. There is great divergence of opinion about the meaning of *patra* and *yogakṣema*. The former according to Aparārka and others means 'a document or debt evidenced by a document.' For *yogakṣema* vide notes to V. M. p. 217.

* P. 128 (text). ‡ P. 129 (text).

(with the clothes to worn by other coparceners) but if they are of more or less value (than those worn by others) then they must be divided. The clothes and other like things worn (or used) by the father should be given to him who partakes of the śrāddha (feast) to him (the deceased father) since Bṛhaspati (p 333 v 85) says

The clothes, ornaments, bed and the like and vehicles and the like used by the father, should be bestowed on the partaker of the śrāddha for him (the deceased father) after honouring (the brāhmaṇa) with fragrant ointments and flowers

Mann (9 119) mentions a special rule about (the division of) goats and the like when uneven in number (i.e. when they cannot be equally divided among the coparceners)

Goats¹ and sheep together with beasts having uncloven hoofs (like horses) should not at all be divided when they happen to be uneven (in relation to the sharers). Goats and sheep, together with uncloven beasts (when uneven and incapable of division into integers) are ordained (to be assigned) to the eldest alone

Cooked food and water (wells &c.)² are to be enjoyed (by all coparceners) according to circumstances. Women i.e. female slaves (dāsīs) when uneven in number are to be made to work (in turn for the partitioning coparceners) according to need but if even in number (in relation to the sharers) they are to be divided. The kept mistresses of the father however should not be divided though even in number since Gautama (Dh 8 23 45) says there is to be no division as regards women connected (i.e. kept by the father)³. In the *Ālpataru* it is said that by the word *yogakṣema* are meant councillors, family priests and the like. Langkāla however says

Those who know the essence (of *dharma*) say that *kṣema* means *pūṛṇa* (charitable works) and *yoga* means *yajña* (sacrifices and other religious rites). They both are declared to be impartible as also beds and seats

1. Suppose there are 1, 18 or 12 beasts and four brothers. Each gets four on a division and the remainder (1, 2 or 3 as the case may be) are to be assigned to the eldest. They are not to be valued and their price is not to be distributed among the brothers. This is the meaning according to Medhātithi and others.

2. Water &c. In *Naiḥkulādi v. Dāt Hanuggeri* 50 Rom. 379 at p 392 this passage about right to wells and water being indivisible is referred to and it is held that if there be no evidence that at a partition they were divided, the law will presume that they continued to retain the character of indivisibility.

3. Haradatta holds that this rule applies not only to the concubines of the deceased father but also to the concubines kept by any one of the dividing brothers. These words about women and mistresses are quoted in *Naiḥkulādi v. M-ajAḥṇi* 50 Rom 601 (a 31 A 1 3 = 23 Rom L. R. 1115) at p 613

Here *pūrta* means ' tanks, public parks and the like (works of public utility)'; *ista* means ' sacrifices, feeding brāhmanas and the like (religious acts)'. The meaning is. whatever wealth has been intended to be donated and has been set apart for these (*ista* and *pūrta*, religious and charitable objects) by any one (coparcener) with the consent of all (coparceners) in the state of union, that wealth should be used by him alone for that religious object and not by any other (coparcener) nor by all acting in a body. *Pracāra*¹ (in Manu IX. 219) means ' ways leading to the house and the like ' and also ' land for the grazing of kine and the like '.

As for S'ankha-Likhita² ' there is to be no division of a dwelling, or of water-pots, or of ornaments, or of clothes worn (by a coparcener) ' and as to Vyāsa

" The gains³ of officiating at a sacrifice, a field, a vehicle, cooked food, water and women—these are not to be divided among kinsmen even up to a thousand generations '

who (S'ankha-Likhita and Vyāsa) declare that dwellings and fields are impartible, these texts are applicable to dwellings (like temples) used for religious purposes, and to land that is used as pasture for kine; or these texts purport to forbid the partition of these (dwellings and fields), when acquired by way of a gift, among the (sons of a brāhmana born of a wife of the) *ksatriya* or other lower caste since there are prohibitory texts (on this point) as noticed above or they (texts of S'ankha-Likhita and Vyāsa) mean that when these (dwellings and fields) are of small value they should not be divided in kind (i. e. by metes and bounds) but there should be a division of their price

Brhaspati (p 382 vv 79-84) mentions special rules about (the division of) clothes and the like.

Those⁴ who declared that clothes and the like are not liable to partition have not thought (over the matter properly) (For) the wealth of the rich may (all) be centred in clothes and ornaments. If they be

1 Nilakantha gives two meanings of *pracāra*. The Mit, Aparārka and Vir. give the first meaning, while the Smṛticandrīkā and Kullūka give the second. This explanation of *pracāra* is referred to in *Shantaram* v. *Waman* 47 Bom 389 at p. 396.

2 This sūtra of S'ankha-Likhita is variously read. Vide notes to V. M p. 278. ' No division of a dwelling '—Vide Partition Act (IV of 1893) sections 2 and 4 and *Vaman* v. *Vaṣuḍev* 23 Bom 73 and *Balshet* v. *Miransahib* 23 Bom 77.

3. The word *yājña* thus translated is explained by the Dāyabhāga as meaning ' the site of a sacrifice ' or ' an idol. '

Nilakantha offers three explanations of these texts, the second of which is the same as that of the Mit. The prohibitory texts about the sons of a brāhmana from a *ksatriya* wife occur on text p 103 (tr p 97).

4 Brhaspati holds Manu in the highest veneration, as he says elsewhere ' that smṛti which is opposed to the drift of Manu is not commended, ' but here he criticizes Manu (9 219).

* P. 130 (text)

kept joint (or undivided) they cannot be (properly) enjoyed nor can they be given (allotted) to one alone (out of many co-sharers) They should (therefore) be divided with skill, otherwise they will become useless. Clothes and ornaments are divided by selling them (i.e. by dividing the proceeds of sale) debts consigned to writing (are divided) after they are recovered (i.e. the bond itself is not divided) cooked (or prepared) food (is divided) by exchanging it for uncooked food. The water of wells¹ which have flights of steps and of other wells is to be enjoyed according to one's respective share, after drawing it out, a single female slave is to be made to work in the respective houses (of the co-sharers) according to their shares. If they (female slaves) be many, they are to be allotted in equal shares (to the sharers). This (very) rule applies also to male slaves. Fields and embankments are to be divided according to the respective shares (of the co-sharers). Ways (or pasture lands) should always be used by the co-sharers (after partition) according to their shares.

**Udgrāhya* means 'after recovering (the debt) from the debtor'.
Kātyāyana says

Wealth² which is consigned (mentioned in) a deed and is designed (assigned) for religious (and charitable) purposes, water (i.e. wells &c.) slaves, a *nibandha* that descends hereditarily worn clothes ornaments and whatever is unfit (for division)—these should be applied (enjoyed) by the members (of the family) according as they were enjoyed in times (before separation of the members).

The (clause) *dhanam*³ &c. means written down in a document after resolving to set it apart for a religious (or charitable) purpose. *udakam* (water) i.e. water contained in a well and the like, *nibandha* means *vṛtti* (i.e. hereditary right to officiate as priest or to receive cash or other income) *nānurdham* means unfit for division.

Yājñavalkya (II 126) declares partition of property kept concealed (by one member) from his brothers and the rest.

Property that is concealed from each other (by co-sharers) and

1. Vide *Govind v. Trimbat* 30 Bom. 275 (= 12 Bom. L. R. 303) at p. 277 where it was said that rights to water and wells belonging to a joint family are indivisible if they are numerically unequal and after partition these must be enjoyed by the separated co-partners by turns.

2. These words *yathā kālopyuktāni* &c. may also mean should be so enjoyed as to be useful (to all co-sharers) on the occasions (when their use is needed). These words of *Kātyāyana* that any portion once assigned for purposes of religion shall be exempted from partition are referred to in *Kāushalchand v. Lakshadurgil* (1875) 1 P. J. p. 276. Vide also 50 Mad. 310 at p. 311.

3. Mll. takes the first half of *Kātyāyana*'s verse *dhanam* &c. as one clause. The *Madanapārijāta* and other works take the first half verse as containing two clauses viz. debt evidenced by a deed (as long as not recovered) and what is set apart for religious purposes.
p. 131 (text)

that is discovered after partition should be divided by them again in equal shares ; this is the settled rule

Anyonyapāhita means ' concealed by the eldest from the youngest and the like ' (i. e. *vice versa*). As to the text of *Manu* (9 213)

He, who, being the eldest, would defraud his younger brothers through greed, shall lose his position as eldest, shall be deprived of his share and shall be punished by the king¹

there also the word *jyestha* implies (i. e. it is merely illustrative and includes) every share in the heritage on the analogy of the staff and the cakes, the meaning being ' even the eldest incurs blame (when he defrauds), what of younger brothers' (i. e. they will be much more blamable) Hence *Gautama*² says . ' him who keeps a sharer off from his share, he (the defrauded sharer) destroys ; if he does not destroy him (the defrauding sharer), he destroys his son or grandson . ' *Bhāgīnam* means ' him who is entitled to a share ' ; *bhāgāt nudate* means ' deprives of a share '. That man who is so deprived destroys (*cayate*) him (*enam*) i. e. him who so deprives (or usurps) If he does not destroy him, then he destroys his son or grandson This is the meaning.

*Nārada*³ says

The wealth acquired by a separated man belongs to him alone ; but as to what is found after being stolen or lost and the property mentioned before, there shall again be a division

Prāg-ukta refers to property concealed by some one from among the

1. i. e. he will not be honoured as eldest and, according to *Kullūka*, will lose his regular and special (*uddhāra*) share.

Māndlik's explanation of this maxim (p 72n 5) is entirely wrong He says that in Southern India cakes are carried after being tied to a stick and ' when a cake is asked for, the servant brings the stick, whereby he leaves it to the master to choose any he likes (p 72n 5). ' *Apūpas* are preparations of flour and ghee. If they were placed on a stick and if any one were to say ' that the stick was gnawed by a mouse ', one would infer as a matter of course from this announcement that the temptingly flavoury (and very soft as compared with the stick) *apūpas* placed on the stick must have been devoured by the mouse. This maxim is very frequently cited in works on rhetoric. The *Mit.* employs it in its comment on *Yāj* II, 126 Vide notes to V M pp 221-22

2 *Nīl* follows the *Mit.* in ascribing this quotation to *Gautama*. It is however not found in the printed *Gautama*. It is from the *Autareya-brāhmaṇa* (II 1. 7) and the *Parāśara mādhyāya* and the *Vir.* correctly call it a *s'rutī*. Vide *Krishnabā* v *Khangowda* 18 Bom. 197 (where it was held that a partition effected without reserving any share for a minor member of the family and without the consent of some one authorized to act on his behalf is invalid as against the minor)

3 This is not found in the printed *Nārada* and the *Śmṛticāndrikā* ascribes it to *Kātyāyana* and connects it with another verse of *Kātyāyana*. ' Whatever property is concealed from each other and what is inequitably divided should be again divided equally when afterwards found out, according to *Bṛigu* '. Vide *Maruṭi* v *Rama* 21 Bom. 383 and *Ganesh Lal* v. *Babu Lal*, 40 All 374 as to reopening of partition

* P. 192 (text).

co-sharers The word *vibhagaḥ* (division) has to be understood after the words *punar-bhavaḥ* (there will again be) Mann¹ says

When after a partition is made some joint property is discovered that partition should not be regarded (as proper) but a fresh division should be made

In case of the denial of partition by any one (of the separating co-owners) Yājñavalkya (II 49) mentions decisive circumstances

On denial of partition it should be understood that the (fact of) partition is to be established by (testimony of) agnatic kinsmen cognatic relations, witnesses, by documents and by (the evidence of) houses and fields being separately held

Yatukaiḥ means separately allotted and there is the relation of *vis-a-vis* (attribute) and *vis-à-vis* (thing possessing an attribute) between that word and *grhasthāṣṭhā* (houses and fields) Nārada (p 193 v 36) says

In case of doubt with regard to the status of division between co-sharers the determination (of the dispute follows) from (the testimony of) kinsmen o document of division and from the separate transaction of business (such² as agriculture &c.)

The same author (Nārada p 193 v 37) says

The religious duty of unseparated persons brothers (and the like) is single when there is partition their *dharma* (religious rites and duties) also comes to be separate

In this (verse) the word *avibhaktāṇām*³ (of unseparated persons) alone yields the *uddesya* (the subject) while the word *bhrātṛdharma* being its attribute is not intended (to be taken literally but only indicatively) Therefore even as regards the father the grandfather the son the grandson paternal uncle brother and brother o son when they are unseparated⁴ the *dharma* (the performance of religious rites and duties) is only single (and not separate for each member)

Though o single performance (*tantra*) of an act having reference to several religious acts is possible, according to the reasoned conclusion

1 This is not found in the printed Manu.

2 This word *pythak kṛya pravartanāt* may also mean from the separate performance of religious duties, such as Vais vaders honouring Gurata &c.

3 Vids above (text p 46 tr p. 42n. 2) about the *śikṣā* rule that the *vis-a-vis* (attribute) of a subject in a rule is not to be taken literally but only indicatively (as in he cleanses the cup) *bhrātṛdharma* were regarded as the subject about which it is laid down or predicated that there is to be a single *dharma* for them (and not separately for each) when they are undivided, the result would be that as regards other undivided coparceners (like uncle and nephews, father and sons) the *dharma* is not one but separate But this is not so. Therefore the subject is *avibhaktāṇām* and the rule applies to all undivided members whatever and the word *bhrātṛ* is only illustrative This v. no of Nārada is quoted in *Dakṣi Prasad v. Tripathi* 1 All 103 (1 D) at p. 102.

(*nyāya*, of the *Purvamīmāṃsā*), only when the place, the time and the agents (in all of them) are the same, yet in this verse (Nārada 16 37) the same (a single performance of *dharma*) is inculcated by express words even when the agents are different but undivided¹. Hence the religious duties of undivided persons that are to be performed with *śrauta* and *smārta* fires are to be performed separately (for each member), since the *āhavanīya* (*śrauta* fire) and the *āvasathya* (*grhya* or domestic fire) are different (in the case of all), being connected (with each individual kindler thereof). Similarly the *śrāddha*² to be performed by the paternal uncle, the brother's son and the rest on the *amāvāsya* (new moon) and other days is separate as the *devatās* (of the *śrāddha* in each case) are different. But in the case of brothers who have not kindled the fires, (*śrāddha* is to be performed) by a single performance (for all brothers) as the *devatās* (in the *śrāddha* by brothers) are the same³. Still when the places (where the brothers reside) are different owing to (one or more) going on a travel abroad and the like, (the brothers must perform *śrāddha*) separately. In the case of those who have consecrated the sacred (*śrauta and smārta*) fires, those religious acts that are to be performed with the (sacred) fires are to be performed separately (though the family is undivided), while the worship of the family deities (idols), the *varśvadeva* (daily offerings to all the gods)

1 *Tantra* means '*yugapad-bhāva*' or 'anekoddes'ena sakṛd-anusphānam' and means doing an act once which serves the purpose of many. According to the *Purvamīmāṃsā* XI 1 53 55 and XI 2 1 one single performance of the *prayūjas* is sufficient for the several principal rites of the *dars'apurnamāsa* sacrifice, the place, the time and the agent being the same. So it may be argued that, as the several members of a joint family are different, the religious rites must all be different, one of the three conditions of *tantra* (viz sameness of agent) being wanting. Nilakantha replies that though this is the doctrine of the *Mīmāṃsā* yet here there is an express text of Nārada laying down a single performance of *dharma*, though the members are many: i.e. this text expressly carries the rule about single performance beyond what is laid down in the *Mīmāṃsā*.

2 Nilakantha abruptly introduces some rules here about the performance of religious acts by undivided persons. The text of Nārada introduces a sweeping general rule to which Nil. specifies exceptions. The *śrauta* fires are the *Āhavanīya*, *Gṛhapatya* and *Dakṣiṇāgni*, which are required in the *Dars'apurnamāsa*, *cāturthmāsyā* and other vedic rites. All offerings in *śrauta*, (Vedic) rites are made in the *Āhavanīya*. The five great daily *yajnas*, the *pārvana śrāddha* and certain other rites laid down in the *grhya sūtras* are performed with the domestic fire. The fire consecrated by A is not the same as the fire consecrated by B: i.e. the fires being related to the persons kindling them and so being different, the rites to be performed with them must be separately performed.

The paternal uncle of a person would offer *pindas* to his three paternal ancestors while the nephew would offer *pindas* to his own three ancestors, i.e. the *devatās* in the *śrāddha* offered by each will be different (though one or two may be common, as the father and grandfather of the uncle will be the grandfather and great-grandfather of the nephew).

3. All brothers have to offer *pindas* to the same three paternal ancestors (i.e. the *devatās* in the *śrāddha* are the same). But if a brother goes abroad, he performs *śrāddha* separately, as the place is not the same, though *devatās* and time are the same.

and the like (are to be effected) by a single performance (for the whole family)¹
Hence Śākala says

For those who reside (together) and cook their food together the worship of the idols in the house and the *vas'vadeva* also are single but in the case of those who are divided (these are performed) in each house (separately)
As to what *Ās'valāyana* (as quoted) in the *Pāṇjāta* says

Of those who reside and cook their food together though divided the chief (i.e. the manager or head) alone should perform the four *yajñas* (daily sacrifices) which are preceded by *vāgyajña* (study and teaching of the Vedas). Men of the regenerate classes separated and unseparated who cook their food separately should every day separately perform before their meals the (five) *yajñas*²

it refers to those who are reunited since the clause *vibhaktāṇām api ekapākeṇa vasatām* (who even though divided reside and cook their food together) and the words *vibhaktāḥ avibhaktāś'ca* (first separated and then joined together) convey that fact³. Therefore in case re-united members cook their food separately the (five daily) *mahāyajñas* are to be performed separately. *Vāgyajña* (in the above verses) means *brahmayajña* *Tatpuruṣakān*⁴ (preceded by it i.e. by *brahmayajña*)

1. It is to be noticed that Kamalākara a first cousin of Nīlakaṇṭha, lays down some what different rules on the points touched upon by Nīl. Vide notes to V. M. p. 202. For *śaśradāra* vide *Manu* III 81-80.

2. The five daily *yajñas* to be performed by every twice-born householder are mentioned by *Manu* III 70 they are *brahmayajña* *śrāgyajña* *devayajña* *bhūyajña* and *ṛgyajña*. *Brahmayajña* means study and teaching of Vedas. *Brahmayajña* is enumerated as the first of the *yajñas* in *Manu* and elsewhere.

3. Nīlakaṇṭha seems to take the words *vibhaktāḥ avibhaktāś'ca* in the reverse order as meaning first separated and then joined i.e. reunited after separation. But this is somewhat far-fetched. According to him the two verses lay down two propositions about reunited persons. If they cook their food together in one place the manager or head alone should perform the five *yajñas*. If even after reunion they continue to cook separately they should perform the *yajñas* separately.

4. In a *bahuvrīhi* compound two words are so related that they together refer to a third word of which they together become the attribute. *Bahuvrīhi* compounds are of two kinds. When a *śāstra* *śāstra* (bring the man who owns variegated cows) it is the man who is brought and not the cows (that is the *bahuvrīhi* compound *śāstra* containing two words *śāstra* and *ga*) refers to an individual who is himself apart from the import of the two words *śāstra* and *ga*. Therefore such *bahuvrīhi* compounds are called *śāstra* *śāstra* in which there is no direct contact or there is no inference of the things denoted by the two words of the compound in the individual that is indicated by the compound. But if a *śāstra* *śāstra* (bring the man who wears variegated clothes) the man who is brought comes along with the variegated clothes i.e. here the thing indicated by the two words forms the *bahuvrīhi* compound is not apart from what is the import of the two words, but it is in direct contact with the *śāstra* wears such compounds are called *śāstra* *śāstra* in which there is direct contact or inference of the things denoted by the two words or in which the *bahuvrīhi* with the thing indicated by the compound. The word *śāstra* *śāstra* (of which *śāstra* is the first) is a *bahuvrīhi* and

is *atadgunasamviñāna* (kind of *bahuvrīhi*) If it were taken as *tadgunasamviñāna* the word 'vāg-yajña-' would be superfluous, since the (first) four (*yajñas*) would follow as a matter of course on account of the maxim 'there being no reason for omitting the first (in an enumeration of several items)' Therefore brahmayajña (the daily sacrifice of repeating Vedic texts) should be performed separately (by united or re-united members) But these two texts are not much respected (relied on) by the learned.

As for the texts (quoted) in the Dharma-pravṛtti¹

Undivided sons should perform a single *s'rāddha* on the anniversary of the death of their parents; if in different countries, they should perform the *Dars'as'rāddha* and the monthly *s'rāddhas* separately (as also the *s'rāddha* on the anniversary of death) If the undivided (brothers) go to (reside in) different villages, they should always perform the *dars'a* and monthly *s'rāddhas* of their parents separately. The brothers, who being unseparated, reside in different villages and subsist on wealth acquired by each separately, should perform the (*ekoddistā*) *s'rāddha* and the *pārvana s'rāddha* (of their parents) separately

And as to what is (said) in the Smṛtisamuccaya

Vais'adeva, (the *s'rāddha* on) the day of death (i.e. on the anniversary of a person's death), the Mahālaya² (*s'rāddha*) etc, as also *dars'as'rāddha* should be performed separately when (the sons) reside in different districts

qualifies the word *yajñān*. If it were taken as a *tadgunasamviñāna*, the result would be that *vāgyajña* would be included in the words *caturō yajñān* (as clothes also come along with the man when we say *cit'avāsasam ānaya*) That verse says 'one alone may perform the four sacrifices' &c In all five *yajñas* are enumerated in Manu and others If one says 'four *yajñas* should be performed,' then naturally the first four (of which *vāgyajña* is the first) in the list of five will ordinarily be understood, no special reason being mentioned why the first should be omitted That being the case the word '*vāgyajñāpūrvakēn*' becomes superfluous, the words *caturō yajñān* being sufficient to convey the sense intended Therefore *vāgyajñāpūrvakēn* should be taken as *atadgunasamviñāna*) In that case the meaning would be 'one alone should perform the four *yajñas* preceded by *vāgyajña*' (i.e. all *yajñas* except *vāgyajña*, just as cows do not come along when we bring *citraḡu*) This interpretation leads to a reasonable view, viz it leaves liberty to all members of a joint or reunited family to engage in *vāgyajña* separately and only the head is to perform the other four *yajñas* The Veda calls upon all, whether joint or not, to study the Veda If only one member were to perform *vāgyajña* (as would be the meaning with *tadgunasamviñāna*) this vedic injunction would be set at naught Nil relies on Jaimini X 5 1-6 for the proposition that in the absence of a special reason, the first items in a series are to be taken (and not the last &c). Vide notes to V M pp 227-229.

1 This is a work on *ācāra*, *samskāra*, *dāna* and *śrāddha* by Nārāyaṇa, who seems to be different from Nārāyaṇabhaṭṭa, the grandfather of Nil The author flourished between 1400 and 1600 A D

2. Mahālaya *s'rāddhas* were prescribed to be performed in the dark half of Bhādra-pada from the first *tithi* to *amāvāsyā* or from the 5th, 6th, 10th or 11th *tithi* to *amāvāsyā*, or at least on one day in that fortnight Vide notes to V M p 230

these also according to some are applicable to re-united (coparceners) residing in different districts. But these texts are in reality without authority. Or the texts might have been composed by some one based on reasoning such as the following. When the place the time and the agents are the same a single performance (of religious rites) follows from the reasoned conclusion (of the *mīmāṃsā*) while a single performance even when the agents are different may be ordained (as above by Nārada) in express words, but in case the districts are different *sādhya*s and the like are to be performed separately (even by undivided members) as there is (on this point) absence of a reasoned *mīmāṃsā* conclusion and of an express text. This is (in brief) the idea.

Nārada (p. 199 vv 38-40) mentions other signs also of division.

It is (only) divided brothers and not undivided ones that can become in respect of each other witnesses or sureties or can give a debt or take back a debt (from each other). *Receiving and paying back a debt the acceptance of beasts (kine &c) of food of houses and fields must be regarded as separate in the case of those who are divided as also documents income (by way of interest) and expenditure. People should regard them to be divided even though there be no writing in whose case these transactions are entered into openly with their co-heirs.

Dāna (giving) and *grahana* (taking back) have reference (in the first verse) to debts, the same *dāna* and *grahana* are repeated in the second verse for the sake of clearness. The meaning is the acceptance (by way of a gift) of beasts and the rest produces (separate) ownership in the case of divided members when it is effected by each separately while in the case of undivided members, it (acceptance) when effected by one member produces ownership even in the others. (The word) *dāna-dharma*¹ means a deed and the like. *āgama* means addition of interest (*kāla*) to the principal. *Āghraṣṭi* (391 v 92) says

Those who have their income expenditure and mortgage dealings separate and who enter with each other into transactions of money lending and trade are beyond doubt divided.

Ānāyapatham means the business of a trader. Yājñiyavalkya (II 63) says:

Among brothers between husband and wife and between father and son the relationship of being a surety or of debtor and creditor or of being witnesses has not been declared (in the texts) when they are undivided.

In the absence of these indicia (of division) orders (are to be resorted to) since the same author (Yājñ II 22) has declared

In the absence of (any one of) these (human means of proof) one out of the divine (means of proof orders &c) is ordained.

1. This word may mean gift & other (lit) words dialectal.
P. 153 (text).

As regards what Viddha-Yājñavalkya says

In case of a doubt regarding the status of separation, the establishment of it is to be made by means of (the testimony of) kinsmen, witnesses and by means of documents, there is no divine proof (in this matter) that has reference to cases where there exist other signs (of separation). If the doubt as to whether (certain persons) are divided or undivided cannot be removed by any means, Manu declares that a fresh partition should be made

When there is a doubt as to whether coheirs are separate among themselves, a fresh partition should be made (by them), even though they might be residing in separate places

Nārada (pp 199-200 vv 42-43) mentions the duties of separated (coparceners)

Where many persons sprung from one (person or family) perform their *dharma*s (religious duties) and worldly transactions separately and are separately possessed of means (such as household utensils) for performing various acts and do not consult (each other) in their transactions, if they of their own accord make a gift or sell, they may do all that as they please, for they are masters of their own wealth

Dharmāḥ are the five (daily) *mahāyājñas* and the rest that are prescribed by injunctive texts, *krivāḥ* means worldly acts such as trade and the like, *karmagunāḥ* are means of (performing) acts such as household utensils, by separateness in these partition is indicated. The meaning is that those who are separated may make a gift, sale or the like even without each other's consent As to what Brhaspati (p 384 v 93) says

Cohens, whether divided or undivided, are alike in respect of immoveable property, since one (coheir among many) is not master in all cases to make a gift, mortgage or sale that text, according to Madana, is meant to negative the right to give away (or sell &c) without the consent (of other coheirs), the crops and the like produced in fields that are left undivided, even though the coheirs may be divided as regards the moveable portion (of the joint family property), while that text, according to Viṣṇanes'vara and others, is meant to facilitate transactions with the consent of divided coparceners in order that doubts as to whether (coheirs) are divided or undivided may be dispelled.¹ The same author (Brhaspati p 384 v 95) says about one who having first separated at his own desire raises a dispute (about the fact of his separation)

He, who, having separated by his own wish, again disputes (the fact of separation), should be made by the king to abide by his share (already allotted) and should be punished, since he is guilty of (vexatious) obstinacy Anubandhaḥ means 'obstinacy'

1 Nilakantha seems to favour the latter view

* P 186 (text). † P. 137 (text),

Now (begins) the order of taking (i.e. succeeding to) *sapratī bandha dāya* (obstructed heritage)

On this point Yājñavalkya (II 185-186) declares the order of succession to the wealth of one who (died) separated¹ and not re-united

The wife the daughters also the parents the brothers their sons, *gotrajas* (agnatic kinsmen) *bandhu* (a cognate) a pupil a fellow-student—of these on failure of (each) preceding the next following is entitled to take the wealth of one who has gone to heaven (i.e. who is dead) and leaves no male issue. This rule applies to all the *varṇas* (the four principal castes)²

The wife if faithful to her husband takes (her deceased husband's) wealth but not if she is unfaithful, since Kātyāyana says

The wife who is faithful (to her husband) is entitled to take the wealth of her (deceased) husband and since Hārta (Laghu Hārta 67) says

If a woman³ becoming a widow when young is head-strong maintenance (and not the estate of her husband) should then be given to her for the passing (i.e. for the support) of her life

Praṣṭapati says

A chaste woman if she die (before her husband) takes away his *agnihotra*⁴ and her husband's estate if the husband die (before her). This is the ancient rule.

Agnihotram means the consecrated fire. The same author (Praṣṭapati) says

Having taken all his (husband's) moveables and immoveables (such as) inferior metals gold liquids (oil ghee &c.) clothes she should cause his

1. In *Ramapja v Satharimal* 3 Mad. 182 (F.D.) a divided son was preferred as an heir to the widow of the deceased. *vid.* p. 185 for reference to V. 11.

2. These verses of Yāj. are translated in many cases. *Vide* *Lalubhai v Maslore* bas 2 Bom 3 3 at p. 416 and 20 Mad. 20th at p. 418.

3. The word *harṣadī* is explained by the Mit. as interpreted of incontinence. It probably means when she leads a wild dissolute life and not the restrained and dignified life enjoined upon widows in ancient works. In *Fala v Ganga* 7 Bom. 81 this passage of Hārta is referred to (at p. 89) and it is said: "It is plain that the authors of the Mit. and the Mayukha intended the above text of Hārta as exclusively intended to qualify the right of the widow to inherit her husband's property" and a doubt is expressed whether the text applies in that sense. In *Gargadhār v Jalla* 26 Bom. 139 it was held that a widow was not disqualified from inheriting the property of her husband on the ground of her unchastity during her husband's lifetime if it is condoned by him. This last was followed in *Lodhe v Al* *Bhaskar v Parn* 40 All. 18. *Vide* as to effect of unchastity on a widow's right of maintenance *Kesari v Lal* 40 Bom. 12 R. 210 where most of the cases on this subject are collected and where it was held that unchastity would disentitle a widow from receiving maintenance even if it be claimed under an agreement.

4. The sh. was cremated with the sacred fire kindled by him. Compare 14.1.42 and the Mit. thereon.

monthly, six-monthly and yearly s'rāddhas to be performed¹. She* should honour with oblations and *pūrta* (charitable gifts) her husband's paternal uncle, preceptor, daughter's son, sister's son, maternal uncle, and also old persons, guests and women (either born in the husband's family or dependent on him).

Kupyam means 'tin, lead and the like' (base metals) As to what Brhaspati (p 378 vv 53-54) says

Whatever property of various kinds such as pledges and the like that belongs to a person after partition, his wife, on his death, shall get it with the exception of immoveables. The wife, even if virtuous and even if a share were allotted (i.e. even if her husband was allotted a share on a partition), is not entitled to immovable property

that, according to *Smṛticandīkā*, refers to a wife having no daughter (even), since a wife who has a daughter takes even immovable property, while, according to *Mādhava*, that text is meant to forbid the sale &c of immovable property (by a widow) without the consent of (her husband's) kinsmen²

1. The *ūddika* s'rāddha is the one performed on the anniversary of the day of death. The monthly s'rāddhas are twelve, performed every month on the day of death and the six monthly s'rāddhas are two. Aparārka, Dīyabhāga and some others read 'sānmāsādīkam' and explain that a widow could not perform the *pārvana* s'rāddha and so that text specifies the monthly and six-monthly s'rāddhas. The word *ādī* refers to the s'rāddha on the 11th day after death, the sapindikarana &c. This verse is referred to in *Lallubhai v. Manoharai* 2 Bom. 388 at p 420 and in *Sundari v. Dahibai* 29 Bom. 316 at p 319.

2. This view of *Mādhava* is more reasonable and has been universally accepted by the British Indian Courts, which hold that a widow cannot alienate her husband's immovable property except for legal necessity or without the consent of those who are her husband's presumptive heirs after her death. As regards movables a widow succeeding as heir has larger powers of disposition during her lifetime than over immovable property (vide *Damodar v. Purmanandas* 7 Bom 155 at p 163) but she cannot dispose of them by will (*Sha Chimanlal v. Doshi* 28 Bom 453), *Gadadhar Bhat v. Chandrabhagabai* 17 Bom 690 (F B), where on p 710 reference is made to the passages of the *Mayūkha* about the wife. In *Gurunath v. Krishnaji* 4 Bom 462 it was held that even if the husband was separate and died sonless, his widow in the absence of special circumstances would have no power to make an absolute alienation of the husband's estate. The consent of the reversionary heirs may validate an alienation by a Hindu widow, since it offers presumptive evidence of the justifiability of the alienation, but in the earlier cases like *Vargujan v. Ghelji* 5 Bom. 563 at p 571 the consent of a female reversionary heir like the daughter was thought to be insufficient. However in later cases it has been held that it does not matter whether the consenting reversioner is a male or a female, vide *Allava v. Sayadkhan* 51 Bom 475 F B (=29 Bom L R 386). In the case of a gift by a widow consented to by a reversioner it has been held that it would be binding on the reversioner on the principle of election to hold the alienation good. Vide *Basappa v. Fakirappa* 46 Bom 292, *Rangasami v. Nachappa* 45 I A 72. The text of *Kātyāyana* 'when the husband is dead' is quoted in *Narasimha v. Venkatachari* 8 Mad 290 at p 292 and it was held that restriction on the widow's power applies to both movables and immovables. This text is

As to what Kātyāyana says

When the husband is dead (his widow) preserving (the honour of) the family should get (i.e. succeed to) the share of her husband as long as she lives, she has no power (over it) as regards gift mortgage or sale

that text refers to a prohibition of gift and the like intended for hards (bandi) panegyrista (cāraṇa)¹ and the like but gifts for unseen (i.e. religious or spiritual) purposes and mortgages and the like conducive to those (purposes) do of course exist (i.e. can be legally made by the widow out of her husband's property) on account of the text already quoted immovable and moveable &c. and on account of the text of Kātyāyana

(A widow) engrossed in *vrata*s (vows or observances) and fasts firmly abiding by (the vow of) celibacy and constantly engaged in restraint (of senses) and making gifts would go to heaven even though she be without a son

As regards what the same author (Kātyāyana) says

Heirless* property goes to the king after setting aside (some wealth) for the women² the servants and for the *śrāddhas* (of the deceased)

also held to include both movables and immovables in *Dhyanendran v. Mynabari* 11 Mo. I. A. 187 at p. 511. In *Pandharinath v. Gorind* 23 Bom. 53 at p. 70 this verse of Kātyāyana is quoted and it was held that a Hindu widow is not competent under the *Mitā* *harsā* to make a gift of movables inherited from her husband. In *Panachand v. Manoharlal* 13 Bom. 186 at p. 143, this verse of Kāṭ and the next the widow engrossed &c. are quoted and it is held that these two verses do not give an unrestricted authority to the widow to make gifts even for the spiritual welfare of her husband and a gift of $\frac{1}{4}$ th of the husband's property for religious purposes was held to be not valid. Vide 41 All. 100 at p. 115 affirmed by P. C. in 44 All. 603.

1. The widow has very large powers of disposition for religious and charitable purposes and those which are supposed to conduce to the spiritual welfare of her husband as said in 8 Moore's Indian Appeals p. 29. Vide *Jagirthibai v. Kankarjirao* 11 Bom. 29; F. R. at p. 309 for reference to V. M., *Chinnaji v. Dinkar* 11 Bom. 520 521. The Vyavahāramayukha allows the alienation of the estate by a widow for pious purposes of which none can be more merited in her case than the payment of her husband's debt (even debts barred by limitation may be paid) - 9 Lahore 33; *Sardar Singh v. Anji Dikari* 45 I.A. 383 (where two out of religious acts are distinguished viz. obsequies of the deceased and other pious observances). Such religious purposes include pilgrimage by widow for her husband's benefit (*Ganpat v. Tukaram* 26 Bom. 83) small gifts to priests at holy places (40 All. 637) &c.

2. These verses of Kāṭ, and Nārada and the comments of the Mayūkhā on the whole of this paper (text. 100) are elaborately examined in *Savitribai v. Laxmalal* 2 Bom. 3 (F.R.) at pp. 603-09 and it is said at p. 611 "This examination of the Mayūkhā lends no support to a widow seeking a pecuniary allowance by way of maintenance from the separated brother of her husband whether paid or unpaid of family estate. In *Isakram v. Asakram* 12 Bom. 26 the text of Kāṭ and Nār are referred to and it is said that though texts speak of only women commentators and judicial authorities have included concubines therein and that a concubine's continued confinement is a condition precedent to her claim of maintenance. *Vij. Chandrasekhar v. Jaganm* (18) 11 J. p. 119 (11 Bom. H.C. R. 27) *See also* F. 100 (text).

the wealth of an (heirless) *s'rotiya* (*brāhmana* learned in the Vedas) should be bestowed on (other) *s'rotriyas*

and as to what Nārada (p 202 v. 52) says;

Except in the case of (an heirless)¹ *brāhmana* the king, who is intent on (observance of) law, should provide maintenance for the women of him (whose wealth escheats to the king for want of heirs). This is declared to be the rule about (taking) the heritage

these texts refer to women guarded as concubines, since the word *patnī* (legally married wife) is not employed therein. As to what Nārada (pp 195-196 vv 25-26) says:

If among brothers anyone dies without issue or becomes an ascetic (a *sannyāsin*), the remaining brothers should divide his estate, except the *strīdhana* (of his wife) And they should provide maintenance for his wives till the end of their lives, provided they preserve (unsullied) the bed of their husband But if they be otherwise (i e if they are unchaste), they (the brothers) should cut off (their maintenance)²

v *Lakshmana* 26 Bom 163 (=3 Bom LR 617) where it was held that the concubine has no legal right against her paramour during his lifetime, but on his death she has a legal right for maintenance against the heir if she continued to be a concubine up to the death of the paramour and was continent afterwards This decision was approved of in *Bai Nagubai* v *Bai Monghubai* 50 Bom 601 (=53 I A 153), which overruled the definition of 'avaruddha stri' given in 47 Bom. 401 at p 410-11 In 50 Bom 601 at p 612 the *Mayūkha* is quoted and it is held that it is not a condition that she should have resided in the same house with the deceased together with his wife and regular family In *Anandibai* v *Chandrabai* 48 Bom 203 it was held that a kept woman whose husband is alive cannot be treated as an 'avaruddha stri' entitled to maintenance on the death of the paramour

1 Vide Manu 9 189 and Baud Dh S I 5. 102 about the property of an heirless *brāhmana* These texts employ the words *yosit*, *strī* and not the word *patnī* When a man dies leaving a *patnī*, his wealth is not heirless and cannot escheat to the king Hence these texts in allowing the king to take after providing for women must be interpreted as referring to concubines in the words 'yosit' &c. This dictum about the wealth of an heirless learned *brāhmana* is not respected in modern times. Vide *Collector of Masulipatam* v *Cavalry Venkata* 8 Moore's Indian Appeals 500 at p 527

2 This text of Nārada is quoted in 2 Bom 494 at p 512 n 1 and in *Bhikubai* v *Hariba* 49 Bom 459 at p 463 and in *Satyabhama* v *Keshavacharya* 39 Mad 658 at p 660 (where a widow who had made an agreement for maintenance with her husband's brother, then led an immoral life but subsequently repented and brought a suit, it was held that she lost her rights to the rate fixed in the agreement but was entitled to claim a starving maintenance), *Valu* v *Ganga* 7 Bom 84 at p 89 and *Vishnu* v *Manjamma* 9 Bom 108 at p 110 The last two cases hold that a 'widow may forfeit her right of maintenance by subsequent unchastity But vide *Moniram* v *Keri Kolitani* 7 I A 115 at p 147 and 2 All 150 (F B) where it was held that subsequent unchastity does not cause forfeiture of a widow's right as heir In *Valu* v *Ganga* 7 Bom 84 at p 89 it was said that the texts draw no distinction between maintenance of a widow in a joint family and bare maintenance, except in the case of an adulterous wife and mother, for whom there are special texts

elers according to Madana to the wives of one who dies undivided since it occurs when it (re-union) is the topic of discussion says

the husband is gone to heaven (i.e. is dead) his *strī* is entitled to *īraṃbhaṃ*, she obtains when he dies undivided his share of the ill her death¹

word *avibhākta* (undivided) is illustrative (and so inclusive) of and also the word *tu* (but) is used in the sense of or there are two propositions (in this verse) out of which the latter is the wife and the former to *loṭa* women thus is the view of The basis (the reason) of this statement (of the law) requires on (i.e. this statement of the law is not quite correct) The or (Kātyāyana) however makes a correct statement (of the law) a wife) being engrossed in serving the elders is entitled to enjoy a assigned but if she does not serve (the elders) only food and should be provided for her

4 means father in law and the rest (the other elders) The that (the widow of a deceased member in a joint family) takes the pleasure of the *gurus* (elders) but otherwise only food and The same author (Kātyāyana) says

widow² who does acts injurious (to the family) who is inimical destroys the wealth (of the husband) and who is addicted to *śūcya* is not entitled to the wealth.

text (Manu 11. 188)

same³ procedure should be followed also in the case of fallen women, *īraṃbhaṃ* should be given to them and they should reside near the

ing to respectable writers refers to the husband (when he is living) *īraṃbhaṃ* means (the procedure) viz deserting the fallen (degraded) to a widow who is suspected of incontinence only maintenance given) since Hārta says

woman becoming a widow (vide above p. 150) *harkasā* (as said) *ākṣarā* means suspected of incontinence

1 verse is quoted in *Taishan v. Satyabhamabhi* 2 Bom 491 at p. 511 and in *Tarmibai* 2 Bom 53 (17 B.) at p. 43

2 verse is quoted in *Musammal Ganga v. Ganga* 1 All 10 (1 B.)

3 verse is quoted in *Dhulabai v. Haribai* 42 Bom 43 at p. 104. Manu in his verses (11. 181 and 184) laid down that kinsmen should treat a man guilty of *śūcya* and all should offer water to him as they do to a dead man & hold up his hand with him (viz. sprinkling, invitation, sitting in his company) and should not inherit (text).

Therefore¹ it is established (by the foregoing discussion) that a lawfully wedded wife, who restrains (her senses), is entitled to take (her deceased husband's) property. But if there be more than one they will take it after dividing (equally among themselves)

In default of her (i e of the widow), the daughter² (takes the estate of the deceased) Hence Manu (IX 130) says

' A son (of a man) is like the man himself and the daughter is equal to the son How can another inherit the estate (of a deceased person) when she (the daughter), who is his self (as it were), is living ?

If there be more daughters than one, they should divide and take the estate. Among them also, if one is married and the other is unmarried, then only the unmarried one (takes the estate), by reason of the words of Kātyāyana .

A wife who is chaste takes the wealth of her husband , in default of her, the daughter (takes) if she be unmarried.

Among married (daughters), if one is rich and the other is indigent, then only the indigent daughter gets (the estate), on account of the dictum of Gautama (Dh S 28 22) ' *strīdhana* (woman's peculiar property) goes to the daughters, unmarried and unprovided³ for ' *Apratisthita* means ' devoid of wealth '. Those who are well-versed in the tradition (of law)⁴

1 This paragraph is quoted in *Hari v Vitar* 31 Bom 560 at p 564

2 The whole section about the daughter is quoted in 46 All 192 at p 196 ' Daughter ' means ' legitimate daughter ' Vide *Meenakshi v Munandi* 38 Mad 144 In *Advyaappa v Rudrava* 4 Bom 104, it was held that a daughter was not debarred from inheriting to her father by reason of unchastity At p 111 reference was made to the entire silence of the Mit and the Mayūkha about the chastity of daughters when both are very particular about chastity in widows and at p 114 the passages of Manu and Kātyāyana and Mayūkha's remarks thereon are quoted This case was approved of in *Tara v Krishna* 31 Bom 495 and followed in *Kojiyadu v Lakshmi* 5 Mad 149 Several daughters succeed as tenants-in-common and in Bombay take absolute estates which they can dispose of even by will Vide *Babaji v Balaji* 5 Bom 660, *Bulakhidas v Keshavlal* 6 Bom 85 (where the verse of Manu and the words ' If there be more take the estate ' are quoted), *Bhagathiabai v Kahnugirao* 11 Bom 285 (F B), *Vithappa v Savitri* 34 Bom 510 (=12 Bom L R 487), *Balvantrao v Bajirao* 47 I A 213 at p 223 (=22 Bom L R 1070) But in all other provinces daughters take only life estates Vide 47 I A 213 at p 221 (in which the difference between the Bombay view and the view of the other courts is explained as due to the dominating influence of the Mayūkha in the former)

3 The word ' unprovided for ' is used in contradistinction to ' enriched ', as was held in 4 All 243 and 47 All 403, in both of which it was further held that the source of the provision is immaterial The text of Gautama and the Mayūkha thereon are referred to in *Jaminabai v Khimji* 14 Bom 1 at p 13 In *Totawa v Basawa* 23 Bom 229 it was said that the courts ought not to go minutely into the question of the poverty of daughters, yet where the difference in wealth is marked, the whole property passes to the poorest daughter. In Mithila there is no distinction between rich and poor daughters and in Bengal under *Dāyabhāga* the criterion is the actual or potential capacity of having male issue

4 Nil has in mind Vijñānes'vara, who propounds this view in the Mit.

* P 141 (text).

say that the word *śrī* (in Gautama's text) is illustrative of (and so inclusive of) the father also

In default of the daughter the daughter's son (takes the wealth) since Viṣṇu says ¹

When there is no continuance of the line (of a man) through son or grandson the daughter's sons obtain the estate In regard to the offering of obsequial rites to ancestors daughter's sons are regarded as sons's sons

In default of daughter's son the father (succeeds) and in default of him the mother And so Kātyāyana says

Of him who is sonless (and dies) the widow born of a good family (who is chaste) also daughters in default of them the father the mother the brother (brother's) sons are declared (to be heirs in order) ²

* And Viṣṇu (Dh³ S 17 4-11) says wealth of the sonless goes to his wife in default of her to the daughter in default of her to the daughter's son in default of him to the father, in default of him to the mother in default of her to the brother in default of him to the brother's son in default of him to the *śakulyas* (agnatio kinsmen) As for what Viṣṇāśvara says, viz that first the mother succeeds to the estate (of her deceased son) and then the father on the ground that in the clause expanding (the word *pitarau*) which conveys its sense the word *mātṛ* (mother) occurs first though in *pitarau* (an instance of) an *ekasēya* which is an exception to Dvandva (compounds in general) no (particular) order is perceptible and on the ground of following the order (of the words) in the *dvandva* (here *mātṛpitarau*) to which (the *ekasēya pitarau*) is an exception and on the ground that the father is common to other sons (from other wives) while the mother is not that is refuted by the very fact of its being in conflict with these texts (of Viṣṇu and Kātyāyana) and (that opinion is also refuted by this viz) there is no authority for (saying that) the word *mātṛ* does (must) occur first in the clause of expanding (the word *pitarau*) for (saying that) *ekasēya* is an exception to (the ordinary) *dvandva* since it (*ekasēya pitarau*) is allowed optionally with

1 This does not occur in the printed Viṣṇu Dh B. but compare Viṣṇu Dh B 15 a and Ma a 217

2 This passage is quoted in *dh vyavahāra* a 4 Bom 104 at p. 111

3 This is attributed to Dhṛṣṭi Viṣṇu by the Mh. Vṛ. and other works and to Apollis Viṣṇu by the Pārś. *śakulyas* The readings of this passage are quoted in the several work differently The printed Viṣṇu reads a in the text but omits the alternative of the daughter's The Viṣṇu reads a and Viṣṇu reads a in the text but omits the alternative of the daughter's The Viṣṇu reads a and Viṣṇu reads a in the text but omits the alternative of the daughter's

P 112 (last)

the (regular) *dvandva* (*mātāpitarau*) and for saying that being common and not being common are factors that determine the order (of succession)¹.

In default of the mother, the full brother (succeeds), in default of him (i. e. the full brother), his son (succeeds). As for what Viṣṇanes'vāra and others say, ' in default of full brother, half brothers (i. e. born of a different mother) succeed and in default of them (half brothers), the

1. The whole of this section on the rights of father and mother is quoted in *Balkrishna v. Lakshman* 14 Bom. 605 at pp 609-610 (in which being a case from Ratnagiri the mother was preferred to the father) 'The father is preferred to the mother as an heir in Gujrat, in the Bombay Island and northern Konkan where the Mayūkha is the paramount authority, while in the rest of the Bombay Presidency the mother is the preferable heir Vide *Khodabhai v Bahadar Dala* 6 Bom 541 An adoptive mother succeeds in preference to the adoptive father in the Bombay Presidency wherever Mit is supreme, *Anandi v Hari* 83 Bom. 404 Step-mother is not included in the word 'mother', vide *Kesserbai v Valab* 4 Bom 188 A remarried woman can succeed to her son by her first husband if the son dies after remarriage, *Basappa v Rayava* 29 Bom 91 (F B) Mother's unchastity does not debar her from succeeding, *Koṭiyadu v Lakshmi* 5 Mad 149 and *Vedammal v Vedanayaga* 31 Mad 100 but vide *Ramnath v Durga* 4 Cal 550 This passage is an excellent example of the brevity and vigour of Nīlakantha's style Nīl first condenses the remarks of the Mit. and then refutes its reasoning Pāṇini (II 2 20) lays down that several words may be compounded when they are together employed in the sense of 'ca' (and) and would be in the same case (when separately employed) Such a compound is called *dvandva*, *mātāpitarau* is an example of it Two other sūtras (Pāṇini I. 2. 64 and 67) lay down that when several individuals of the same kind (*sarūpa*) are grouped together in the same case relation, only one of them is retained and if the two individuals are male and female, the male is retained *Pitarau* is an example of *ekas'esa* (lit where only one out of several is left) The general rule about *dvandva* compounds is that all the several words forming it are retained, while in such *ekas'eṣas* as *pitarau*, *bhrātārau*, only one word is present and the other (*mātā*, *svasā*) is suppressed. From this point of view *ekas'eṣa* may be said to be an exception to *dvandva* Such compounds are very limited in number The reasons which Mit puts forward in preferring the mother to the father are three, (1) even in expanding the *ekas'esa pitarau* the word *mātr* occurs first (*mātā ca pitā ca pitarau*), (2) in the regular *dvandva* form *mātāpitarau*, the word *mātr* comes first, (3) the father may have several wives from whom he may have several sons i. e. the father is common to several sons whose mothers are different, while the mother is not so Nīl first of all says that the view of the Mit preferring the mother is opposed to the dicta of ancient sages like Viṣṇu and Kātyāyana Then he examines *śariatm* the reasons assigned by the Mit He first denies that the *ekas'esa* is an exception to the *dvandva* According to the Siddhāntakaumudī, both *Ekas'eṣa* and *Samāsa* are two out of five *vṛttis* Besides when a certain thing is stated to be an exception the results stated as the rule do not follow at all But *pitarau* is only an optional form, as we have *mātāpitarau* also So Nīl is right in saying that the *ekas'eṣa pitarau* being optionally allowed with *mātāpitarau* is not an exception Nīl asserts that there is no authority for saying that in expanding the word *pitarau* or in dissolving the compound *mātāpitarau* the word *mātr* comes first This is an over-statement on the part of Nīl Though Pāṇini does not say that *mātr* must come first, yet the *Kāśikā* and other grammatical authorities have always for ages dissolved the compound as ' *mātā ca pitā ca* ' Nīl is also right in denying that being common to the son with other sons from other wives is a ground for postponing the father This argument of the Mit is extremely specious Vide notes to V. M. pp. 241—244,

sons of full brothers (succeed) this is not correct since (on this view) there will be contradiction in taking the word *bhrātṛ* (in Yājñavalkya's verse) as used in two functions, viz in the primary (function or sense) with regard to the full brother and in the figurative sense with regard to the half brother¹. Some, however say that in the word *bhrātarah* (of Yāj) there is *ekas'epa* of dissimilar things as expressed in the (expanded) form brothers and sisters are (designated) *bhrātarah* on account of the rule (of Pāṇini I 2 69) the words *bhrātṛ* and *putra* may be compounded (respectively) with *svasṛ* and *duhitṛ* to form an *ekas'epa* and hence on failure of brothers sisters (succeed). This (view) is incorrect since there is no authority for taking the word *bhrātarah* (in Yāj) as an *ekas'epa* of dissimilar objects.²

The sons of brothers³ also even if at the time of the death of their paternal

1 The rule of *mimāṃsā* is that the same word in a sentence must have only one sense. Vide above p. text 92 and tr. p. 88n. 3. Yāj. uses the word *bhrātarah*. If that word primarily means full brother the sense of 'half brother' can be ascribed to it only in a secondary (*gaupī* *vṛtti*) sense. The Mī. includes both full and half brothers under *bhrātarah*. Nīl. says that thereby the Mī. runs counter to a well known *mimāṃsā* doctrine. Vide above p. 131n. 1 for *s'akti* meaning the primary function of a word. An obvious reply to Nīlakapāṇi's criticism is that the word *bhrātṛ* simply means brother (whether full or half is not expressed) that the Mī. prefers the full brother to the half brother because the former has more particles of the bodies of the parents than the latter and so has greater propinquity and that if *bhrātṛ* primarily meant full brother (as Nīl. insists) Yāj. should have used (in II.188) the word *bhrātṛ* alone and not *sodara* as he does.

In *Ekoba v. Kusīra* 46 Bom. 10 (where a man died leaving his half brother by the same father and a half brother by the same mother who had remarried) it was held that the half brother by the same father was entitled to succeed and that there is no provision in the Mī. or elsewhere for the sons born of the same mother after her remarriage being treated as brothers born of the same womb for the purpose of inheritance so as to be included in the meaning of the word *bhrātarah* used in the text. But Nanda Papdita in his *Valjayanī* does speak of a half brother born of the same mother but of a different father as an heir. Vide *Narayan v. Laxman Day* 1 L. R. 51 Bom. 781 at p. 793 where references are given.

2. In *Mulji v. Curassandas* 24 Bom. 503 at pp. 504-60 the passage from some however as to the end of the section on sister is quoted. Ordinarily *bhrātarah* would mean brothers simply and not brothers and sisters. There is nothing in the context in which the word of Yāj. occurs to show that *bhrātarah* is to be taken in this somewhat unusual sense. An *ekas'epa* may be either of similar objects or of dissimilar objects. The dual or plural form of a word is the *ekas'epa* of similar objects and the dual or plural forms of only a few words like *bhrātarah* or *bhrātarah* are sometimes used as *śaṅkya* of dissimilar objects. The *Śimplician* also criticises this view following a *śūtra* of Ap. Dh. 8. Vid. not to 35 p. 216. The *Itihāsa* (which is later than the *Yājñika*) held this view but its doctrine has not been accepted in the *Itihāsa* in *śūtra* and the sister succeeds only a *śūtra*. Vide *Shri v. Curassandas* 31 Bom. 503 at 3 (2 Bom. 1 R. 1).

3. This passage of the text is of course only used by the *śūtra* and similar words of the Mī. viz. "when the brother of a woman is dead, an inheritance in the estate of the death but before the actual partition of the estate of the deceased one of the brothers or the son of the brother (who died after the death of the father) is to be made through the father and when a partition of the estate is to be made it is proper to give the rule all the shares is according to the *śūtra*. This commentary is a case like the *śūtra*. A *śūtra*

uncle they had no connection with the wealth (of the deceased uncle) because their father was then alive, are entitled to take by partition with their other paternal uncles the share of their father (in the deceased uncle's estate) according to the rule (Yāj II 120) ' among (claimants) sprung from different fathers the allotment of shares is according to the fathers '.

~ In default of the brother's son,¹ the *gotraja*² *sapindas* (succeed).

leaving B, C, D his brothers as his nearest heirs, but before the estate of A is actually divided B dies leaving two sons E and F. Here E and F have no right to the property of A at his death, as their father B was alive. Yet at the time of actual partition, they will take the share that would have gone to their father B. One has to see whether the property has vested in a person and not whether it has been actually divided. The Mit had to state this expressly because it might be argued that as Yāj prefers brothers to brother's sons, in dividing the wealth of A the brothers C and D should exclude the sons of B. The reply is that one must look to the time of death and not to the time of actual division of the estate.

The general rule of construction accepted by the Bombay High Court is to construe both the Mit and the Mayūkha so as to harmonize them with one another wherever and so far as that is reasonably possible. Vide *Gajabai v Shrimant Shahajirao* 17 Bom 111, 118. Therefore the above passage of the Mayūkha must be construed in the same way as the Mit. In *Chandika v Muna* 29 I A 70 (= 21 All 273 = 1 Bom L R 376) the Privy Council following an incorrect rendering of this passage made by Boradale remarked with regard to the tribe of Ahir Thakurs that migrated from Gujarat to the United Provinces before the Mayūkha was composed that the Mayūkha only embodied and defined a pre-existing custom and that according to the Mayūkha sons of a brother who is dead share along with surviving brothers and that the rule as found in the Mayūkha does not go beyond brothers and their children. It is submitted with great respect that there is a double error here. The Mayūkha had nothing to do with Gujarat, being composed by a Mahārāstra Pandit, whose family had migrated to Benares, under the patronage of a Bundella chieftain. In *Haridas v Ranchordas* 5 Bom L R 516 the court following the P C decision allowed the son of a pre-deceased brother to take along with the brothers of the deceased. In *Jagubhai v Kesari* 49 Bom 282 (= 27 Bom. L R 226) at p 286 the differing translations of this passage of the Mayūkha are referred to and it was held following the P C decision on the principle of *stare decisis* that the nephews of the deceased share the inheritance along with his surviving brother or brothers.

The distinction between the whole blood and the half blood is not to be carried beyond the brothers and their sons. Vide *Shankar v Kashinath* 51 Bom. 194 F B (= 29 Bom L R 1), where all relevant texts and decided cases are referred to. In *Suba Singh v Sarafraz* 19 All 215 (F B) it was held that this distinction between whole blood and half blood applies also to all *sapinda* relations other than brothers and their sons. In *Ganga Sahai v Kesri* 37 All 545 P. C (= 42 I A 177) the Privy Council held that 19 All 215 was restricted to sapindas of the same degree of descent from the common ancestor and that a paternal uncle of the half blood succeeded in preference to full paternal uncle's son.

1 In *Appaji v Mohanlal* 54 Bom 564 F B (= 32 Bom L R 700) it was held that a brother's grandson is not included in the word 'brother's son'. Vide also *Chinnasami v Kunju* 35 Mad 152 which discusses all texts and modern writers.

2 *Gotraja* literally means 'born in the *gotra* or family'. The *gotrajas* are agnatic kinsmen and are of two kinds, *sapindas* and *samānodakas*. The Mayūkha does not dilate upon the explanation of *sāpinda*. It tacitly assumes the explanation of *sapinda* given by the Mit. In commenting upon Yāj I 52-53 the Mit explains *sapinda* relationship as arising from having particles of the body of the same ancestor. It is limited to seven degrees on the father's

* P. 143 (text).

side and five degrees on the mother's side. In calculating degrees the ancestor to whom relationship is traced and the person whose sapinda relationship is to be ascertained are to be taken into account. Vide *Lallubhai v Manjorebai* 2 Bom 338 p. 423 and *Lallubhai v Gombai* 7 I. A. 212 at p. 232 (= 5 Bom. 110 at p. 112) and *Kesaribai v Harnaraj* 80 Bom. 431 at p. 448. *Ramchandra v Tirayak* 41 I. A. 220 at p. 800-801 for a translation of the passage of the Mit. on sapinda relationship. A man's six male paternal ancestors, his six male descendants, the six male descendants through an unbroken male line of his six paternal ancestors are his gotraja sapindas. The samśnodakas will be explained later. Sapindas are either gotraja or bhinnagotraja (born in a different gotra). The latter, according to the Mit., are called bandhus. In *Jadunath Kuar v Dushakar* L.R. 53 I. A. 173 at p. 190 the Privy Council say that two conditions must be satisfied before one can claim as a gotraja sapinda viz a common patriarchal stock and sapindaship with the deceased i. e. blood connection through a common ancestor by unbroken male descent.

The word *baddhakrama* (Mit. whose order of succession is fixed) is usually translated as the compact series of heirs. The heirs expressly specified in Yāj. from the wife to the brother's son are *baddhakrama* take in the order in which they are enumerated and do not allow anyone else not specifically mentioned to take before them. Vide *Nahachand v Hemchand* 2 Bom 31 at p. 34.

If certain persons are specially invited for a meeting or dinner, they are assigned special seats, while those who come uninvited or without previous intimation are seated after those who are specially invited. This maxim is made use of here in assigning a place to the paternal grandmother. Vide *Jaimini V 2-12* Sabara on *Jaimini V 5.1* and *Sādhara's bhūṣya on Vedāntasūtra IV 2.8* for illustrations of this maxim. In *Mohandas v Krishnabai* 5 Bom 577 it is said (at p. 602) that this maxim only applies to gotrajas and does not apply to bandhus.

The position of women is peculiar. The general rule in the whole of India, except in Bombay and Madras, is that no females succeed as heirs to males unless they are expressly named as heirs. There are only five such female heirs, viz. the widow, the daughter, the mother, the paternal grand-mother and the paternal great-grand mother. In Madras a few more females such as the son's daughter, the sister, the brother's daughter succeed as *bandhus*. In the Bombay Presidency both under the Mit. and the Mayūkhā numerous females are brought in as gotraja sapinda heirs and succeed to males. A woman by birth belongs to one gotra and by marriage passes into the gotra of her husband. The wife, the mother, the paternal grand mother are not gotraja in the literal sense (born in the family) but they come to have the same gotra by marriage i. e. they become *sagotra*. The Mit. paraphrases the word gotraja by *sagotra* and *samśnodagotra* when it says, in this way is to be understood the succession of sapindas of the same gotra (*samśnodagotrāṇām sapindāṇām*) upto the 7th degree. In *Lallubhai v Manjorebai* 2 Bom 338 (at pp. 420 and 423) it is said that, as the paternal grand mother is specially named as an heir by Mann and as the Mit. names the paternal great-grand mother as a gotraja, the term gotraja is not confined to males. In the same case it was said that, though the foundation of the right of widows of gotrajas under the Mit. is slender and almost shadowy under the Mayūkhā the widows of gotrajas say: "as must be admitted as heirs on the ground of positive acceptance and usage" (Vide 2 Bom. 34 at p. 41) and *Lallubhai v Gombai* 7 I. A. 212 at p. 237 (= 5 Bom 110 at p. 121). Vide also *Lakshmbai v Jayram* 6 Bom. H. C. R. (A. C. J.) 152. Therefore in the Bombay Presidency both under the Mit. and the Mayūkhā, widows of gotraja as well as widow brothers, widow uncle's widow are admitted as gotraja sapindas though they are not expressly mentioned in those two works and though they are not born in the family but only enter the family by marriage (i. e. they are *sagotra* or *samśnodagotra*). They however do not take absolute estates, but only limited estates. Vide *Tuljaram v Malharaj* 5 Bom CC1. In those females who are born in the family when they take a heirs take them to absolutely. In the Bombay Presidency in other presidencies the widows of gotrajas say: "as not special

Even amongst them the first is the paternal grandmother, since Manu (9 217) says :

When even the mother is dead, the father's mother should take the estate.

Although she (i. e. the paternal grandmother) is mentioned (by Manu) immediately after the mother, yet, as it is not possible to make room for her in the compact series (of heirs) ending with the brother's son, she should be placed at the end after the brother's son following the rule ' those that come uninvited should be seated at the end '.

In default of her (i. e. the paternal grandmother), the sister (succeeds) since Manu (9 187) says

The wealth¹ (of the deceased) belongs to whomsoever is the nearest (to him) from amongst the *sapindas* and since Brhaspati says

Where there are many relations, *sakulyas* (persons belonging to the same family or *gotra*), and *bāndhavas* (*bandhus* or cognates), he, who is the nearest of them, shall take the wealth of a childless (deceased) person and since she (i. e. the sister) also has the status of being a *gotraja* equally (with her brother) as she was born in the *gotra* of her brother. There is not, however, (in her) the status of being a *sagotra*, that status (of being a *sagotra*) is not however here (i. e. in Yāj) declared as the motive (or reason) of taking the property (of the deceased)²

fically named in the Mit. and Yāj are not heirs at all The grand-mother does not take it as *strīdhana* (1 All 661) and takes only a limited estate as an heir (*Dhondī v Radhabai* 86 Bom 546) The passage of the Mayūkhia about the grand-mother is quoted in 2 Bom 388 at pp 433-34. 'Grandmother' does not include a paternal step grand mother and a sister would be preferred to a paternal step-grand-mother, vide *Lingangowda v Tulsawa* 17 Bom L. R 315.

1. This half verse is variously explained by Kullūka, the Madanapārijāta, the Bālam-bhaṭṭi and other works, the chief difficulty is caused by *sapindūdyah* and *tasya tasya* Some take the first as equal to ' sapindāt yah ' and others as one word meaning ' sapinda and the like '. Some take one ' tasya ' as referring to the deceased and the other to the inheritor, while others take both as referring to the inheritor, corresponding to *yah* (one more *yah* being suppressed for the sake of the metre) Some take *sapindāt* as meaning ' sapindamadyāt,' while others take it as referring to the deceased. Vide *Lallubhai v Mankuvarbai* 2 Bom. 388 at p. 421 for a translation of this passage as ' whoever is the nearest *sapinda* his should be the property '

2. Nil stands almost alone among writers of eminence in assigning a high place to the sister as a *gotraja*. Even his own cousin Kamalākara does not do so. His reason is that the sister being born in the same *gotra* as her brother is a *gotraja* and as Yāj speaks of *gotrajāh* as heirs, she is one Nil. admits that she is not a *sagotra*, but Yāj. does not say *sagotrāh* but only *gotrajāh* This argument of Nil is extremely specious There are two weighty objections against this argument. Whatever meaning Yāj might have attached to the word *gotrajāh*, authoritative commentaries like the Mit take it to mean *sagotrāh* The sister is no doubt a *sapinda*, but she is not a *sagotra* Though born in the *gotra* (and so a *gotraja* in the etymological sense), on marriage she passes into another *gotra* and so is not a *sagotra* (which is the popular conventional sense of *gotraja*) Secondly if the sister is to be re-

In default of her (the sister),¹ the paternal grandfather and half brother take (the estate) by dividing it (equally) since their nearness to the deceased (propinquity) is equal, as (the former) is the father's father (of the deceased) and (the latter) is the son of (the deceased's) father. In other cases also where the propinquity (of several heirs) is equal and there is no distinguishing circumstance, however slight such as the order² of the words (in a text) the same (rule) holds good. Hence in default of

garded as a *gotraja* heir because born in the *gotra*, there is no reason why other females who are born in the *gotra* such as the son's daughter, the brother's daughter, the aunt (father's sister) should not be classed as *gotraja* heirs. But Nil. is entirely silent about these other females. The courts hold that the reasoning of the V M about a sister cannot be extended to a son's daughter. Vide *Venilal v Parjaram* 20 Bom. 178. Nil. wanted somehow to bring in the sister and quibbles on the word *gotraja*. In *Ganesh v Waghlu* 27 Bom. 610 (= 5 Bom. L. R. 531) the paternal grandfather's grandson being a *gotraja* was preferred to father's sister who was held to be only a *bandhu*. The Mit. does not mention the sister at all and brings in the paternal grandfather immediately after the paternal grandmother. In *Lalla Bai v Manikarbai* 2 Bom. 338 it is said (at p. 421) that here Borradaile's translation of the passage about the sister is inellectuous and almost unintelligible at the end and a correct rendering is given. In *Keserbai v Valab* 4 Bom. 188 at p. 200 a corrected translation of the passage about the sister is given. In *Sakharam v Sitabai* 3 Bom. 343 it was held that a full sister succeeded in preference to a half brother in the island of Karanja near Bombay as the Mayūkhā was the paramount authority in Gujarat Bombay island and North Konkan. But in the other parts of the Bombay Presidency where the Mitāksharā is supreme, the result would have been exactly the opposite as in *Bhagwan v Varubai* 21 Bom. 800 (where the half brother's son was preferred to the sister). At p. 818 of this last case the passage of the Mayūkhā about the sister is quoted. In *Lakshmi v Dada* 4 Bom. 310 full sister was preferred to step-mother or paternal first cousin. In *Jana v Rakhma* 43 Bom. 461 it was held that the full sister is to be preferred to the half-sister. The rule about indigent daughter succeeding before the rich one does not apply to sisters (vide *Bhagurikhar v Daya* 5 Bom. 264). The sister whether full or half, takes an absolute estate in Bombay. *Keserbai v Valab* 4 Bom. 188. The sister is not in the line of heirs at all in Bengal and Benares 5 All. 311 F. R. and 2 Cal. 725. But this law about the sister is now changed by Act II of 1929 which enacts that the son's daughter, the daughter's daughter, sister and sister's son succeed in that order after the father's father and before the father's brother, but this Act is not to affect the sister's position as laid down in Bombay decisions (*Shidramayya v Neelkarai* 35 Bom. L. R. 80³).

1. The order of succession according to the Mit. is different. It is full brother, half-brother, full brother's son, half brother's son, paternal grandmother, paternal grandfather, father, paternal uncle, and then his son. According to the Mayūkhā the order is full brother, full brother's son, paternal grandmother, sister, paternal grandfather and half brother together. Though the Mit. does not mention the sister as heir under judicial decisions she is an heir even under the Mit., but would be placed (where the Mit. prevails in the Bombay Presidency) after full brother's son and paternal grandmother while under the Mayūkhā the full sister would come before the full brother and his son.

2. *Krama* or *sthāna* is one of the means for settling what things or a thing are principal or subsidiary. Vide *Jaimini III.2.11*. *Krama* (order) is of six kinds of which *arthakrama* (order of the senses denoted by words) and *śabdakrama* (order of words only) are two. Vide notes to V M p. 343 for examples. Vide *Lalla Bai v Manikarbai* 21 All. 123 at p. 120 for reference to this equality of nearness in the case of brother's grandson and paternal uncle's son.

them (the paternal grandfather and half-brother), the paternal great-grandfather, the uncle and the half-brother's son take (the estate) by sharing (it equally)¹ All the *sapindas* and *samānodakas* (take) in the order of their propinquity. Manu (V. 60) declares them as follows:

The *sapinda* relationship ceases with the seventh person (in the line) and that of *samānodakas* ends when birth and name are no longer known.²

(*Saptame*) means after the seventh (person) is reached (or has passed away).

In default³ of *sodakas* (i. e. *samānodakas*) *bandhus* (take as heirs).

1. The treatment of the subject of inheritance after the sister in the Mayūkha is very scrappy, vague and unsatisfactory. Even the Mit gives more details. The latter distinctly states that after the father's line come in order the paternal grandmother, paternal grandfather, uncle, uncle's son, after the paternal grandfather's line come in order the paternal great-grandmother, the paternal great-grandfather, grand-uncle and his son, that in this way up to the seventh person (from the deceased) is to be understood the right of succession in the case of 'samānagotra sapindas'. The Mayūkha is quite silent about the great-grandmother. It does not expressly refer to lines beyond the great-grandfather, nor does it clearly state how many generations in each line are to be taken. The following propositions have been established by judicial decisions (I) That the nearer line excludes the more remote i. e. a male in the father's line excludes a male in the grandfather's line and the latter excludes the great-grandfather's line, (II) that the widow of a gotraja sapinda in one line is postponed to any male properly belonging to that line (e. g. a paternal uncle's grandson is to be preferred to a paternal uncle's widow as in *Kashibai v. Moreshwar* 35 Bom 389 = 13 Bom L R 552), (III) but the widow of a gotraja sapinda of a nearer line excludes a male belonging to a remote line e. g. a brother's widow is a nearer heir than a paternal uncle's son or the grandson of the grand-uncle, *Basangavda v. Basangavda* 89 Bom 87 = 16 Bom L R 699 and *Khandacharya v. Govindacharya* 13 Bom L R 1005. As regards what is meant by line (*santāna* in the Mit) there was great divergence of view, vide *Buddhasing v. Lalthusing* 42 I A 208 = 37 All 604 for reference to three different views. It may be assumed that according to the Bombay view each line extends to six descendants in the main line from the common ancestor (i. e. inclusive of the common ancestor there are seven generations in each line who are sapindas and also gotrajas). Vide *Rachava v. Kalvingappa* 16 Bom. 716, *Appaji v. Mohanlal* 32 Bom L R 709 (F B). In *Vithalrao v. Ramrao* 24 Bom 317 at p 334 four meanings of the word *pratyūṣutti* (nearness) are given and it is said at p 338 that the Mayūkha theory of propinquity is of descent in line and degree from the common ancestor and that inheritance through a common female ancestor is unknown. In *Garuddas v. Laldas* 35 Bom L R 597 (P C) it was laid down overruling 24 Bom 317 and 51 Bom 194 that the preference of whole blood over half blood extends to all heirs of the same degree such as paternal uncles and is not confined to brothers or brother's sons.

2. This whole passage about sapindas and samānodakas is quoted in *Bar Devkore v. Anurtram* 10 Bom 372 at p 380 and it was held that 'samānodaka' includes 'descendants from a common (male) ancestor more remotely related than the 18th degree from the propositus and that a samānodaka is to be preferred to a bandhu, but *Rama Row v. Kuttiya* 40 Mad 654 dissents from 10 Bom 372 and holds that a samānodaka must be within 14 degrees from the common ancestor. Vide *Haribhai v. Mathur* 47 Bom 340 at p 342 for quotation about sapindas and samānodakas.

3. *Bandhu*, according to the Mit, is a sapinda but of a different gotra i. e. they are cognate kindred who are related to the propositus through a female and not through an unbroken male descent. This section about bandhus is quoted or referred to in numerous cases, vide e. g. *Sha Chamanlal v. Doshi* 28 Bom 453 (= 6 Bom L R 460) at pp 455-56, *Ramcharan v. Rahim* 38 All 416 at p 421, *Parot Bapalal v. Mehta Harilal* 13 Bom. 631, *Muthuswami v. Synambedu* 23 I. A. 83 at p 89 (= 19 Mad 405).

And they are (thus stated) in another *śmṛti*:

* The sons of one's father's sister the sons of one's mother's sister and the sons of one's maternal uncle—these are to be known as *ātmapandhus* the sons of one's father's father's sister, the sons of one's father's mother's sister the sons of one's father's maternal uncle—these are to be known as one's *pitṛbandhus*, the sons of one's mother's father's sister the sons of one's mother's mother's sister the sons of one's mother's maternal uncle—these are to be known as one's *mātṛbandhus*.

Here¹ (i e in the texts quoted) the order (of succession) is that which is conveyed by the order of the words of the text

1 In *Gridhari v The Government of Bengal* 12 Moore's Indian Appeals 448 it was held that the enumeration of bandhus is only illustrative and not exhaustive and that the maternal uncle though not mentioned here is a very near bandhu and would succeed in preference to his own son, who is specifically mentioned. Following this case it was said in 23 I.A. 83 (at p. 82) that the Mit. rather classifies by sample without attempting to specify every member of each class. The words here the order &c. are quoted in *Aphandus v Kriśṇabai* 5 Bom. 597 at p. 602 and it is said that this remark only applies to the preference of *ātmapandhus* to *pitṛbandhus* and of *pitṛbandhus* to *mātṛbandhus* and that there is nothing in the Mit. or Mayikha which can be construed into a direction that the nine specified bandhus are to take precedence of all unspecified bandhus and that the text of Manu (2.187) furnishes the proper ground for decision. This remark here the order &c. is quoted in *Bajappa v Gangappa* 4 Bom. 48 at pp 51 and 53 and it is held that it does not refer to preference among *ātmapandhus* *inter se* Mandlik's footnote this applies to the three classes as well as to the several members of the three classes was quoted with approval in *Appan dai v Bagupati* 33 Mad. 430 at p. 443 (where mother's sister's son was preferred to maternal uncle's son) but it was disapproved in *Sakharan v Ballkrishna* 40 Bom. 759 F.R. at p. 753 (= 27 Bom. L.R. 1003) and the case in 33 Mad. 430 was disallowed from in 38 All. 416 at p. 424. The decision in 33 Mad. 430 was disallowed from in 48 Mad. 722 where the Mayikha is quoted at p. 742.

There is a bewildering mass of cases on the succession of bandhus and it is impossible to reconcile the decisions. Besides some principles have been introduced by the decisions which have no direct basis in the texts or commentaries. In *Umaid Bahadur v Udochand* 6 Cal. 110 (F.R.) it was assumed that there must be mutuality of *sapinda* relationship between the person claiming as bandhu and the propertius and that in order that a man may be an heritable bandhu of the propertius they must be related either directly through themselves or through their mother or father. In *Ramchandrar v Vinayak* 11 I.A. p. 230 (= 43 Cal. 531) the above propositions were accepted and it was said that *sapinda* relationship in the case of bandhus extends only up to five degrees (relying on the Mit. on the mother's side in the mother's line after the fifth &c.). It is submitted with great respect that all these propositions are based on no solid textual authority and are not supported by sound reasoning. If the enumeration of bandhus in the three verses quoted in all digests is not exhaustive but only illustrative how can it be said that the relationship must be only through one's self or one's mother or father? Similarly if sapinda relationship extends to seven degrees on a man's father's side and five degrees on a man's mother's side (1.63. 1.65) a bandhu (who is a bhīnagotra sapinda) may be so provided he is within seven degrees on his father's side from the common ancestor of himself and deceased. Vide *Lama Siva v P* 47 All. 10. The text of Manu (2.187) on which the requirement of mutuality has been correctly interpreted. Vide *S. Ramania v Fargas Khan* 41 Mad. 111 at p. 117 and 4 Cal. 111 (text).

(If an objection were raised that) as the right to the wealth (i. e. inheritance to the deceased) in the case of the wife and all the other heirs is based on their being directly connected with the deceased, so in the case of the *bandhus* also let the same rule be followed ; hence how is it that the *bandhus* of the father and mother (of the deceased) are (declared) to be entitled to the wealth (of the deceased) ? The (two) verses ' the sons of the father's father's sister &c. ' are meant only to convey the connection between a term (*sañjñā*, here *pitṛbandhu* and *mātṛbandhu*) and the objects denoted by it and not to convey the connection of these with the wealth (of the deceased) (We reply) since even without this text (i. e. the two verses about *pitṛbandhus* and *mātṛbandhus*) it is possible to employ the word (*bāndhava* or *bandhu*) for the *bandhus* of the father and mother on

Pichu v Padmanabha 44 Mad 121 at p 128, where Sadashiva Ayyar J says that the verse about *atmabandhus* is a childish and spurious text and that it is an illogical, incomplete and inconsistent classification of *bandhus* and criticizes the doctrine of mutuality as fallacious (at p 130) and (at pp 128-129) the dictum in 6 Cal 119 (at p 128) that ' the heritable *bandhu* must be a descendant of the maternal grandfather of the propositus or of the father or mother of the propositus is wrong. This opinion of Sadashiv Ayyar J is criticized in 44 Mad 753 (P C) at p 761 (=48 I. A 349). Vide 49 Mad 652 at pp. 660-662 for criticism of Sarvadhikari's rules and of 6 Cal 119. Great confusion is caused by judges giving varying reasons for preferring one *bandhu* belonging to one class over another *bandhu* of the same class e g where the claimants are equally related in degree to the deceased, a male is to be preferred to a female (*Narasimma v Mangammal* 13 Mad. 10, *Balkrishna v. Ramkrishna* 45 Bom 353), sometimes the ground stated is said to be that *bandhus ex parte paterna* are preferred to *ex parte materna* (*Saguna v Sadashiva* 26 Bom 710 and 55 Cal 1153), that those between whom and the *propositus* a single female intervenes are to be preferred to those between whom and the *propositus* two females intervene (30 Mad 406, which is not accepted by *Rajappa v. Gangappa* 47 Bom 48), even where the Mitākṣarā law applies it was held by the Privy Council that those *bandhus* who confer greater spiritual efficacy are to be preferred to others, though of the same class and though equally near in degree, who confer less spiritual benefit. Vide *Jotindra Nath v. Nagendra Nath*, 33 Bom L R 1411 (P C) where the son of a half-sister of the father of the *propositus* was preferred to the son of the sister of his mother. As regards *bandhus* specifically named in the verses conflicting decisions have been given e g 48 Mad 722 holds that the maternal uncle's son is to be preferred to the maternal aunt's son, while in *Rajappa v. Gangappa* 47 Bom. 48 those two *bandhus* were held entitled to succeed equally. The following cases will give some idea of the complexities of the problems involved, *Muthusami v. Muthukumarsami* 16 Mad 23 at p. 30 (same case in P C as 19 Mad 405) sets forth four propositions which are approved of in *Vedachala v. Subramanna* 48 I A 349 at p 360 = 44 Mad 753 at p 763, *Aditi Narayan v. Mahabir* 48 I A 86, *Kenchava v. Girmallappa* 48 Bom 569 (P C) = 57 I A 368, *Sakharani v. Balkrishna* 49 Bom 739 (F B) = 27 Bom L R 1003, *Umashankar v. Mussummat Nageswari* 3 Patna L J 633 (F B), *Gajadhar v. Gaurishankar* 54 All 698 F. B., which holds that Sarvadhikari's rules are substantially correct and arrives at a conclusion exactly opposite to that in 49 Mad 652. In order to prevent uncertainty and wasteful litigation consequent thereon it is extremely desirable that the Legislature should at once intervene by enacting a simple and easily applicable method of indicating preference among *bandhus*.

Now (begins) the discourse on reunited persons

On this Bṛhaspati (p 381 v 72) describes reunion ¹

That man who being (once) separated dwells again through affection with his father brother or uncle is said to be reunited with him

* According to the Mītākṣarā and the rest reunion (of a man) can take place only with his father brother or paternal uncle and not with any one else since (others) are not mentioned in the text but it is proper to say that it (re-union) takes place so as to be co-extensive with those who make the partition the words father and the rest (in the verse of Bṛhaspati) are only illustrative of those who made the partition , just as in the case of the (Vedīś sentence) he plants the post half inside the altar and half outside ² Otherwise there would be the fault of the splitting up of the sentence ³ Hence re-union may take place even with (one's) wife paternal grandfather brother's grandson, paternal uncle's son and the like ⁴ On account of the same case relation (being employed in the text of Bṛ) in the form he is reunited who having been separated lives together again there can be no reunion between the sons of separated brothers ⁵ Reunion means a wish or intention (expressed) in the form our present or future wealth shall be common (between us) until a fresh partition

On this subject Manu (IX 210) declares a special rule about a fresh partition between reunited persons

If reunited⁶ (members) dwelling together should again come to a division

1. Bṛhaspati's text is quoted in 12. Cal. 631 at p. 638 where it is held that according to the Dīyabhāga it is not illustrative but mandatory and that there can be no reunion except between the persons specified In *Dasari Kumar v Jogendra* 33 Cal. 371 it was held that there cannot be according to the Mīt. reunion between first cousins who were originally joint, but had separated. In *Dalabux v Fakhmabai* 80 I A. 130 at p. 130 (= 5 Bom. L. R. 469 and 80 Cal. 725) the text of Bṛhaspati is quoted and it is said that reunion can take place only between persons who were parties to the original partition.

2. Vide text above p. 115 and tr. p. 123 for this sentence.

3. For explanation of *vibhakti* vide p. 90 n. 1 above. The two rules (*vibhā*) which this single text of Bṛhaspati is supposed by the Mīt. as laying down are (1) reunion takes place when separated coparceners again begin to live together and (2) that reunion can take place only between the three classes of persons specified.

4. In *Lakshman v Saigobhamabai* 2 Bom. 491 at p. 503 it is said about this passage relating to the wife that it implies a previous partition in the sense probably of the allotment of a share in a division with sons and then the text of *Āpastamba* *Ryā pītyon-na vibhāgo vidyate* is quoted.

5. The words *vibhakti*, *sthitā* and *samīkṣyā* are in the same case (i.e. nominative) and so the circumstances connoted by them must all inhere in the same person. In *Samudrala Paraha v Samudrala Venkata* 33 Mad. 165 it was held that succession to a reunited family was by survivorship and that that mode of succession was not confined to the members that reunited but the son of a reunited member born after reunion is also reunited and takes by survivorship.

6. The printed Manu reads *vibhakti* for *samīkṣyā*

P 146 (text).

then the shares are equal, in such a case the right of primogeniture does not exist.

Here some say that unequal distribution being negatived (or prohibited) by the clause ' the shares are then equal ' itself, the purpose of again expressly forbidding the right of primogeniture (in the words ' *jyaisthyam tatā na vidyate* ') is to convey that there is no inequality due to mere seniority (in birth) but there may be inequality at the time of fresh partition due to the inequality of estate (put together) at the time of reunion¹ But others² say as follows since the clause beginning with the word ' *jyaisthyam* ' (in *Manu*) is merely a repetition (of what precedes), the shares will be equal even when there was inequality of wealth (brought into hotchpot at the time of reunion) And usage is to the same effect Hence when it is possible to explain this text (of *Manu*) as based on usage it is improper to imagine a Vedic text opposed to it. And the science of judicial administration is generally based, like grammar, on the usages (of the people)³

Brhaspati (p 381 v. 77) says .

"If any one of the reunited members acquires wealth by learning, valour and the like, two shares (of it) must be given to him and the rest are entitled to equal shares

When from the rule that the acquirer gets two shares two shares are established (even in the case of the re-united acquirer) this text (of *Br.*) has a purpose of its own in indicating that, though two shares are allotted to the acquirer in a partition among coparceners who are not re-united provided the acquisition is made without detriment to the ancestral wealth, in a partition between re-united coparceners two shares are allotted (to the acquirer) even when the acquisition is made with detriment to the re-united property⁴ This is the view of *Madana*

Yājñavalkya (II. 138) states the persons who are entitled to take the estate of one reunited .

1 This is the view of *Aparārka*, *Sm. O* and *Vir*

2 This is the view of *Nilakanṭha* If the text of *Manu* were interpreted as some do, we shall have to assume a rule opposed to the one laying down equal division in those cases where at the time of reunion there was inequality in the wealth contributed by the reunited members But if the words ' *jyaisthyam* ' are taken as a mere repetition (*anuvāda*) of what precedes in another form there is no necessity to assume a text and popular usage will be followed by the text of *Manu*, who says ' usage is transcendental law ' (I. 108).

3. Vide as to grammar notes to *V. M* p. 264.

4. *Mandlik* (tr p 85) and *Gharpure* (tr p 120) both understand ' *arjakasya dvau bhāgau* ' as a text, but they do not state where that text is to be found It appears that those words are not a quotation but summarise the rule stated in *Vas* (17 51) According to *Madana* this verse of *Br* does not merely reiterate what *Vas* says, but has a special purpose of its own *Madana* starts with a proposition which is not acceptable to *Nilakanṭha* who says above (p 137) that even when wealth is acquired by a man with the help of ancestral estate the acquirer gets two shares. The *Sm. O.*, *Vir.* and *Par M.* explain this verse differently. Vide notes to *V. M.* p 265.

* P. 147 (text).

A reunited (person) takes (the estate) of a re united co-heir (who dies), but a full brother (takes the wealth of) a full brother (dying)

This is an exception to the rule contained in the text the wife daughters &c (Yāj II 135) Hence the meaning is what determines the right of heirship for taking reunited wealth is not the relationship of being a wife &c but the fact of being a re-united member (with another) The opinion of Viśiṣṭaśara Madana and others is since it is a general rule that an exception has the same province (scope) as the rule (to which it is an exception) and since the words of one dying without male issue (occurring in the preceding verse Yāj II 136) are to be supplied as connected (with this text) it also (Yāj II 138) applies to one who leaves no son grand-son or great-grand-son, therefore a reunited (coparcener) alone will take the wealth of a deceased reunited coparcener of that sort (i.e. one who has no male issue) even though nearer (persons) like the wife and the rest exist who are not reunited with him (the deceased) This (opinion) is open to question When it is possible to explain (a text) without it (i.e. without resort to the principle of *anupāṅga*) there is no authority for supplying (clauses from a previous text) As for the sameness of province (between a rule and an exception) it is not expected that it (sameness of province) should be complete in every respect but only to this extent that somehow both (rule and exception) relate to (the right of succession among) the *śapinda*s of the deceased It may be objected that if the word of one sonless is not to be supplied (in Yāj. II 138) then the word of one gone to heaven also cannot be supplied (in the same verse) and the result would be that there would be no word meaning of one deceased (with which to connect the verse Yāj II 138) (To this the reply is) it would not be so, since that term (viz. of one deceased) can be got from the words of Manu (9.211) to be quoted hereafter viz. if he were to be excluded from a share or if any one of them dies. If that term (viz. of one sonless) be supplied (in Yāj II 138) the (unacceptable) result would follow that of two sons or of a son and grandson, one being re united with the father and the other not so re-united both will get equal

1. In the text on p. 147 read 'गृन्तस्यैव हि पितृवसस्य पुत्रवान्निह' for 'गृन्तस्यैव हि पितृवसस्य पुत्रवान्निह' सनिहित

2. *Anupāṅga* is a technical term in the Pūrvaśrautika (II 1.49) which means supplying a word or words from one sentence into another sentence or passage. Vid. notes to V. 34, pp. 266-267

3. The rule with daughters &c and the exception a reunited coparcener takes the estate of a reunited coparcener have this in common that they both relate to the succession of *śapinda*s to a deceased person

4. The verse of Manu (9.211) occurs in the context of reunion and therefore Yājñalkya's verse (II 138) can be connected with it and it is not necessary to understand certain words like *avyākṛta* ya and *aputra* ya from Yāj II 136 into Yāj II 138. The maxim of interpretation is that all smṛti texts bearing on a topic are to be read together and supplement each other

*shares (in the deceased father's property) since (on that hypothesis) this text would have no application to one (a deceased reunited person) dying after leaving a son ¹ In that case the result would be opposed to popular usage which is the basis of the authoritativeness of the science of *vyavahāra* (law and judicial administration). (An objection may be raised that) if (the word *aputrasya*) be not supplied (in Yāj II. 138), this verse will be applicable also to one who dies reunited leaving a son and then in a competition between a son who is not reunited (with his deceased father) and a brother and the rest who are reunited (with the deceased), the brother and the rest alone (who are reunited) will get (the estate of the deceased) and not the son and the like (who are not reunited) (The reply is that) it is not so and (the objection) will be answered in explaining the latter half of this verse (Yāj II 138).

(The author) states (in the words ' *sodarasya* &c ') an exception to what is laid down in this first quarter of the verse (viz. ' of one reunited, the reunited coparcener ') here the words ' *samsistinah samsistā* ' are understood (in the second quarter) The meaning (of the second quarter) is that in a competition between a full brother and a half brother, both being reunited (with the deceased), the full brother who is reunited should take the wealth of the deceased reunited member. The latter half of the verse (Yāj II 138) is ' *dadyāt* &c '. The meaning (of this latter half) is if at the time of dividing the estate of a deceased re-united member the pregnancy of his wife was not ascertained and a son is subsequently born, the paternal uncle or the like who was reunited (with the deceased) should deliver the share (of the deceased) to such a son, but in the absence of a son he should take the share himself ² Here the mere fact of being a son determines the right to take the share of (the deceased) father and not the fact of being born after the partition (between the surviving reunited coparceners), because the latter supposition serves no purpose, is cumbrous and would lead to the (unacceptable) result that a son born to a reunited coparcener in a distant country before partition would not be entitled to share (his father's estate) if the fact (of his birth) was not known (to the partitioning members). Therefore an uncle or the like though reunited must give the share (of the deceased reunited member) to his son previously born, though not reunited (with the deceased).

1. If ' *aputrasya* ' were supplied in Yāj. II. 138, that verse would have no application to a reunited person who left male issue. Then the result would be that if a man died reunited with a son and also left a son or grandson who was not reunited, both sons would take shares, as the verse ' of one reunited, a reunited coparcener takes the wealth ' applies on the hypothesis supposed only to one dying issueless.

2. The Mit and the Mayūkhya widely differ as to the interpretation of Yāj II 138. The Mit supplies the word ' *aputrasya* ' in it, Nilakantha does not. The Mit connects the first half of II 138 with the latter half, while Nil. takes the two halves as independent. Vide notes to V M. pp. 268-270 for details.

* P. 148 (text).

The same author (Yāj II 139) propounds the right of a reunited half brother and a full brother not reunited to share equally the wealth (of the deceased brother)

One born of a different mother if reunited, may take the wealth (of the deceased) but one born of a different mother if not reunited does not take it , (a full brother) even though not reunited should take (the wealth) and not the half brother (alone) though reunited

Here by the expressions ' born of a different womb ' born of a different mother and the like the half brother alone is not denoted but the paternal uncle and the like also *since the etymological meaning (of these words) applies to them also without any distinction¹ Otherwise it would follow that the text propounding reunion with the uncle and the rest is without any purpose, there being no other result brought about by the state of reunion.² The words *asamsṛṭyapi* ' are connected with both the preceding and the succeeding clauses like a lamp on a threshold ' And the word *samsṛṭya* by being repeated conveys one who is reunited in wealth and also a full brother who is related to the same womb (as the deceased).³ When the first meaning of *samsṛṭya* (viz. one reunited in wealth) is taken the word ' *api* (also) is to be understood after it and at the end of the verse the word *ev.* (alone) is to be supplied. Hence the following are the meanings of the sentences (of this verse) - (1) *anyodarya* i e one born of a different womb such as the wife father paternal grandfather half brother paternal uncle and the like if reunited (with the deceased) takes the wealth (of the deceased) (2) one born of another womb if not reunited does not take (the wealth) By this reunion is declared by the method⁴ of positive assertion and that of negation as the cause of taking wealth (as heir) in the case of one born of a different womb, (3) The full

1 The paternal uncle of a person is as much born of a different mother as his half brother

2 What is the purpose of reunion ? It is this that the reunited man should succeed to the wealth of a reunited deceased person in preference to another relative equally related but not reunited. As among half brothers one who is reunited takes in preference to one who is not re-united, so the same rule should apply to paternal uncles. If reunion were not a ground of preference among paternal uncles, a paternal uncle stands to gain nothing by reunion.

3 A lamp on the threshold sheds light inside the house and also outside. So the words *असंयुहपि* ' are to be connected with the preceding clause *नामदीर्घो धने हरेत्* and also with the succeeding one *पार्ष्णात् समृत्*

4 *संयुह* has two meanings, (1) one reunited and (2) a full brother. In the latter half of II 139 we have two clauses *असंयुहपि पार्ष्णात्समृत्* (full brother) and *संयुह* (one reunited) (*अपि*) *अन्यमात्र* (*एव*) न (*सुदीयात्*)

5 Whoever is reunited takes the wealth of the deceased. This is the method of *avaya* (positive declaration) those who are not reunited do not take the wealth (when there is reunion with some) this is the method of *vyatikhya* (negation or absence).
P 112 (text).

brother called here 'samsrṣṭi' takes the wealth, even though he be not reunited; by this the fact of being a full brother is itself declared to be a cause (of taking wealth); (4) a 'samsrṣṭa' i. e. one whose wealth is reunited, but born of a different mother, does not alone take the wealth. Hence the conclusion is that both take the wealth in equal shares, one because he is reunited (though born of a different mother), the other because he is a full brother (though not reunited) Manu (9. 211-212) makes this very point clear in his section on reunited coparceners:

If the eldest or youngest of several brothers were to be deprived of his share or if any one of them were to die, his share is not lost; but the full brothers and reunited coparceners and the full sisters should assemble together and should divide that share equally.

'Hiyeta' (be deprived of) means 'by entrance into another order (of ascetics &c.), by degradation for sins and the like'.¹ The word 'sodaryāḥ' is connected with 'brothers' (in the latter half). 'Those who' are reunited' mean the wife, the father, paternal grandfather, half brother, the paternal uncle and the like'. On this point Prajāpati states a special rule.

Whatever concealable wealth (like gold and silver) exists is taken by the reunited members (though born of a different mother); but lands and houses are taken according to their shares by (full brothers) though not reunited.

'Antardhanam' means gold, silver and the like which it is possible to conceal by being deposited underground &c.; 'samsrṣṭaḥ' i. e. a reunited member born of a different womb should take it; but full brothers should take lands; and cows, horses and the like should be taken by brothers full and half. This is the meaning. Madana says that a reunited coparcener though born of a different womb, alone takes even kine, horses and the like. But this (view) is not based on the text (of Prajāpati). In the Smṛti-candrīkā (it is said that) the full brother alone, though not reunited, takes when what is left (by the dying member) is either concealable wealth or land or kine and the like. The authority (or basis) for this view is questionable. Among full brothers, if some are reunited and others are not reunited, the reunited (full brothers) alone should take the wealth,

In *Bindra v Mathura* 6 Lucknow 456 (F.B) it is said that while the general rule as regards reunited members is that of succession by survivorship, an exception giving preference to uterine (sodara) brother not reunited has been engrafted to that rule and that under the *Mitākṣarā* a uterine (sodara) brother though not reunited succeeds as against the father (of the deceased) though reunited

1 The section on exclusion from inheritance below sets out the circumstances under which a man was deprived of his share or right to inherit

2 Vide notes to V M. pp 273-275 for the varying interpretations of the two verses of Yāj (II 138-139) and of Manu (9. 211-212),

* P, 150 (text).

because of the existence (in their case) of two reasons (for taking wealth) viz. being a full brother and being reunited Hence Gantama (28. 26) says When a reunited (coparcener) dies one reunited takes the wealth Bṛhaspati (p 381 v 76) says

(Two coparceners) who again (i. e. after separating) become reunited through affection take the share of each other (on death)

The following then is the essence extracted from the above (discussion) The son whether reunited with his father or not should take the whole share of his father since the fact of being a son is alone the determining factor as regards the rights to take the share Even among sons if one is reunited and the other is not then the (son) reunited alone takes (the whole share) since the text says of one reunited the reunited (Yāj II 138) In a competition between a son reunited and any reunited person other than a son the son alone (takes the wealth) since this has been expounded above on the words *dadyāc-śāpāharec-cāmāsm* (Yāj II 138 latter half) In a competition between reunited persons other than the son such as the parents the brothers paternal uncles and the like the parents¹ alone take Among them (the parents) Madana says² that the mother takes first and then the father The brother uncles and the like (when all are reunited) should take (the wealth of a deceased reunited coparcener) by sharing it equally since the determining factor for being entitled to take the estate viz state of reunion exists in the case of all of them When there is a competition between a (full) brother not reunited (on the one hand) and a paternal uncle half brother or the like (on the other) who is reunited they take after dividing equally since Yāj (II 139 and 138)

A full brother even though not reunited should take the wealth and not the half brother (alone) though reunited , of a reunited (coparcener) the reunited coparcener but in the case of a full brother the full brother

If there is only the wife who is reunited (with the deceased) she alone takes since the text is of a reunited coparcener the reunited coparcener When there is a competition (assemblage) between the wife who is reunited and other males who are reunited they alone take and not she So also S'ankha and Nārada (pp 195-196 vv 25-27) on starting the treatment of reunited coparceners say

Among brothers if any one dies sonless or becomes an ascetic the rest (of the brothers) should divide his wealth (among themselves) except the *śṛīdhana* (of his wife). They should provide for the maintenance of his wives up till the end of their lives if they keep (unsullied) the bed

1. The view of 'all kanyas' would be different according to Dīpa-śaṅkha if the father comes before the mother

P 151 (text)

of their husband, but if they be otherwise they should cut off (the maintenance) It is enjoined that she who is his daughter is to be maintained out of her father's share, she takes the share (of her father) till her marriage, after that (marriage) her husband should maintain her.¹

Just as in the (Vedic) text ' If after a man has set apart rice for offering (in *dars'a istī*) the moon were to rise in the east, he should divide the husked grains of rice (set apart for the *istī*) into three classes ' (Tai. Sam II 5. 4 1--2) the actual setting apart of the rice is not intended to be prescribed (as a condition for undergoing the *pṛyāś'citta* for the unexpected moonrise), since another text (S'atapatha-brāhmaṇa XI I 4. 1) ' if (the moon) rises when the (rice for the) offering (is not set apart) ' it is understood that preparations for the offering (are meant to be the condition), so in the above passage (from Nārada and S'ankha) from the very opening verse (of Nārada in that passage) it is understood that reunited members are the agents of the actions of dying, becoming an ascetic or dividing and therefore the word ' brothers ' is not to be taken literally (but only as illustrative)² As to what S'ankha says after starting a discussion about reunited members ' the wealth of one dying sonless goes to the brothers, on failure of them the parents take it or the eldest wife ', that is intended, according to Madana,³ for fixing the order (of succession) among the reunited brothers and the rest, when a reunited coparcener dies after the death of those with whom there was reunion such as the paternal uncle, the brother's son or half brother The same author (Madana) says that even here

1 In *Bai Mangal v. Bai Rukhmīni* 23 Bom 291 this last verse is quoted at p. 295 and it is said ' all text-writers appear to be agreed on this point viz that it is only the unmarried daughters who have a legal claim for maintenance The married daughters must seek their maintenance from the husband's family If this provision fails and the widowed daughter returns to live with her father or brother there is a moral and social obligation, but not a legally enforceable right by which her maintenance can be claimed as a charge on her father's estate in the hands of his heirs '.

2 Vide notes to V M pp 277--279 for detailed explanation of this passage Nārada has before the three verses quoted in the text a verse ' सप्तयाना तु यो भाग ' that is, the discussion starts with reunited coparceners in general, hence the word ' brothers ' in the first of the verses quoted in the *Mayūkha* is not restricted to brothers only but stands for all reunited members This is illustrated by a Vedic example If a man through mistake makes preparations for a *dars'a istī* and then it being really the 14th of the dark half the moon rises in the east, an expiatory rite is proscribed ' *Nirvāpa* ' means ' setting aside grains intending them for being offered to a deity ' The question arises whether the expiatory rite is to be performed only when the preparations for *dars'a istī* have gone so far as ' *nirvāpa* ' or even if they have not gone so far The S'atapatha prescribes the expiation even if the grains have not been set apart Hence the words ' *havir niruptam* ' in the Tai Sam are not to be taken literally

3 Madana's view seems to be that this text lays down a special order of succession (other than the general one of wife, daughter, daughter's son &c), when one who was reunited with an uncle, nephew or brother dies after all of them are dead.

* P. 152 (text).

(among parents) the mother takes first and then the father 'The eldest wife (in the text of Śaṅkha) (takes) if she is self-restrained (i. e. chaste). In default of the wife the sister (takes) to the same effect is Bṛhaspati (p. 381 v 75)

She who is his sister is entitled to get a share therein. This is the rule in the case of one (dying) childless and also without wife and parents¹

Some read this verse as she who is his daughter In default of daughter and sister, the nearest sapinda (takes)

Now begins (the section on) Strīdhana

Manu (IX. 194) says

What was given before (nuptial) fire, what was presented on the bridal procession what was given as a token of love, whatever is obtained (by a woman) from her brother mother or father—these are declared to be strīdhana of six sorts.

The word six (in *ṣaḍvidham*) is meant only for excluding a lesser number² Hence the word and the like in the (following) text of

1 This verse of Bṛhaspati about the sister is referred to in *Asmabai v. Velobai* 4 Bom. 188 (at p. 203) and also in *Tukaram v. Narayan* 80 Bom. 839 (P. B.) at p. 233.

2 The idea is that the mention of six kinds does not exclude a larger number but only emphasises that there cannot be less than six kinds of strīdhana. As the verse of Manu does not exclude more than six kinds of strīdhana, the verse of Yājñavalkya which after expressly naming some kinds of strīdhana employs the word *ēdya* is not in conflict with Manu's but rather harmonious with it. The Mit. gives the widest possible meaning to the word strīdhana, when it says on the word *ēdya* (and the like) in Yāj. II. 145 that the word *ēdya* includes what is obtained by a woman by succession to ancestral property by purchase, by partition, *akṛuro* (adverse possession) and finding. The Mayūkhya does not expressly state, as the Mit. does, that strīdhana has a very wide meaning but divides strīdhana for purposes of succession into two kinds, *pūribhūjika* (technical) and *apūribhūjika* (non-technical). The former embraces such varieties of strīdhana as *adhyāgni*, *adhyāvāha*, *nika*, *anvīdheya* &c. enumerated in the smṛti texts of Manu Yāj., Viṣṇu and others, while the non-technical strīdhana comprehends wealth acquired from strangers or by mechanical arts or by her own labour or in any other way. Judicial decisions have not only not followed the Mit. but have very much restricted the meaning of strīdhana. In *Shro Shankar Lal v. Dabi Sahai* 25 All. 463 (P. C.) it was held that property inherited by a female from a female is not her strīdhana in such a sense that it passes to her strīdhana heirs in the female line to the exclusion of males and that there is no distinction between a female inheriting from a male and a female inheriting from a female under the Benares school (*Shro Paritab v. The Allahabad Bank* 25 All. p. 6). This means that property obtained by a female from a male or female is not strīdhana. This is the law in the whole of India except in Western India. Vide also *Chetty Lal v. Chetty Lal* L. R. C. I. A. 15 at p. 21. The Privy Council in 25 All. 463 at p. 4 refer to the view of the Mayūkhya which makes property inherited by a female from a female her strīdhana. Vide also 45 All. 18. In *1441 Mungol Prasad v. Mahadev Prasad* 23 I. A. 121 (= 81 All. 231) it was held that the share obtained by a mother on partition among her sons is not her strīdhana and on her death devolves on her husband's heirs. So the position of the Mit. as to partition also is

*Yājñavalkya (II. 143) is easily explained (or harmonized)

What was given (to a woman) by her father, mother, husband or brother, what was presented to her before the (nuptial) fire, wealth given to her on supercession and the like are enumerated as *strīdhana* (woman's *peculium*).¹

And Viṣṇu (Dh. S. 17. 18) mentions more (varieties than six) .

What was given (to a woman) by her father, mother, son and brother, what was presented to her before the (nuptial) fire, wealth given on her husband marrying (another woman), what was given by her relatives (or cognates like the maternal uncle), *s'ulka* and *anvādheyaka*² (these are the kinds of *strīdhana*)

Kātyāyana defines *adhyagni* (given before the nuptial fire) and the other kinds (of *strīdhana*)³

What is given to women at the time of marriage before (the the nuptial) fire that is declared by the wise to be *adhyagni* *strīdhana*. That again which a woman obtains when she is being taken (in a procession) from her father's house (to the bridegroom's) is declared to be *strīdhana* of the *adhyāvahanika* kind⁴ Whatever is given to (a

negatived. On the point of adverse possession there is a conflict of decisions. In *Kanhai Ram v. Musammat Amri* 82 All. 189 it was held following 5 I. A. p 1 that what is acquired by a woman by adverse possession becomes her *strīdhana*, vide also *Krishnai v. Shripati* 30 Bom 883, *Subramanian v. Arunachellam* 28 Mad. 1 at p. 7. But in *Lajwanti v. Safa Chand* 51 I. A. 171 (=5 Lahore 192) it was said 'if possessing as widow she possesses adversely to anyone as to certain parcels, she does not acquire the parcels as *strīdhana*, but she makes them good to her husband's estate' This was followed in *Anant v. Mahadeo* 31 Bom. L. R. 628 But in 46 All. 769 and *Suraj Balli Singh v. Tilahdhar* 7 Patna 168 and in *Sant Baksh Singh v. Bhagwan* I L. R. 6 Lucknow p. 365 at p. 873 the P. C. case of *Lajwanti v. Safa Chand* was explained and it was held that if a widow holds property adversely it becomes her *strīdhana*. As regards property acquired by a widow from the accumulations of the income of her husband's property vide *Isri Dutt v. Hansbutti* 10 Cal. 325 (P. C.), *Saudamini v. Administrator-General of Bengal* 20 Cal. 438 (P. C.), 41 Cal. 870.

1. In *Brij Indar v. Rance Janki* L. R. 5 I. A. 1 this verse of Yāj. is quoted (at p. 14) and it is said "And the words 'and the like' or 'such like' would show that the author did not intend to limit his definition to the particular kinds of property therein enumerated." *Adhivedanika* is wealth given to a wife as a *solatium* when she is superseded and the husband marries another woman. It is defined by Yāj. II 148 (quoted in the text below) Yāj. I. 78 mentions the circumstances under which alone the supersession of a wife was allowed. In *Bhugwandeem v. Mynabae* 11 Moore's Indian Appeals at p. 512 it is said that the *Vivāda-ointāman* and *Mayūkha* confine *strīdhana* within the definitions of Manu and Kātyāyana and that they exclude the property inherited and the other acquisitions which are comprehended in the last clause of the para of the *Mitākṣarā*

2. *S'ulka* and *anvādheyaka* are explained in the verses of Kātyāyana quoted below.

3. Vide notes to Kātyāyana verse 894 for the origin and development of *strīdhana* in Vedic times and the times of the sūtras

4. The V. R. (p. 528) says that when the married girl is taken back from the bridegroom's house to her father's, what is given by the father-in-law and others is also *adhyāvahanika*.

* P. 158 (text).

Nirhāra means expenditure ¹

In a certain kind of property Kātyāyana declares the absolute dominion (of woman)

That is known to be *saudāyika* which is obtained by a woman whether married or a maiden in her husband's or father's house from her brother or parents² On obtaining wealth of the *saudāyika* kind it is held (it desired) that women have independent dominion (over it) since it was given by them (by the kindred) as a support in order that they may not be reduced to a terrible (or wretched) condition. It has been declared that women always have independent dominion over *saudāyika* as regards sale or gift at their pleasure and even as regards immovables³

But over immovable property given by her husband she has no absolute dominion as said by Nārada

Whatever was given by a loving husband to a woman she may enjoy as she pleases when he is dead or she may give it away excepting immovable property⁴

1. In *Lakshman v Satyabhamabai* 2 Bom at p. 512 (foot note 7) it is said that it is better to translate *nirhāra* by board than as expenditure

2. *Sārdham* is a bad reading. Read *vīpi* instead *Saudāyika* is a technical word used in a peculiar sense by Kāt. It is derived from *sudāya* and comprehends several kinds of stridhana property. It is specially coined for saying that over *saudāyika* a woman has absolute power of disposal even during her husband's life-time. It is wealth which a woman receives from her parents, brothers and their relations (but not from the husband or his relations). This is the interpretation of Sm. C. and V. R. (p. 511) but the *Dīyabhāga* reads *bhartṛṇ sakṛs* &c and thus includes husband's gifts also under *saudāyika*. In *Muthukarappa v Selathammal* 30 Mad 208 Kātyāyana's definition of *saudāyika* is translated (at p. 300) the varying views of Sm. C., Par. M. and Sm. are set out and it is held that a gift by the father of immovable property to his daughter before marriage was *saudāyika* and after absolute disposal. In *Venkaraddi v Hanamantla Gorda* 54 Bom. L. R. 1144 Kātyāyana's verses on *saudāyika* are quoted and it is held that property bequeathed to a woman by her maternal grandfather is her *saudāyika* stridhana which she is competent to alienate without the consent of her husband

3. These two verses are quoted in 1 Mad. II C. R. 85 at p. 90 (foot-note) *Bhagirthubai v Kankajirao* 11 Bom. 283 (F. R.) refers to Kāt. on *saudāyika* (at p. 502). In *Dham v Raghuwathi* 1 L. R. 30 Bom. 222 these two verses and the definition of *saudāyika* are quoted (on p. 238) and it is held that except as to the kind known as *saudāyika* a woman's power of disposal over her stridhana is during coverture subject to her husband's consent and that she cannot dispose of such stridhana (other than *saudāyika*) by will where the husband survives her and is not shown to have assented to the will. Vide *Bhagaranal v Bai Durali* 27 Bom. L. R. 633, where 30 Bom. 272 was distinguished. In *Vaithubai v Jankar* 1 L. R. 1 Bom. 121 the last of the three verses of Kāt. is relied on (at p. 123) for the proposition that a Hindu female is not on account of her sex absolutely disqualified from entering into a contract.

4. This verse is quoted in *Venkata Ram Ram v Venkata Surya Rao* 1 Mad 231 at p. 257 and in 25 All. 341 at p. 3.3 (where it was held that in immovable property given or devised by husband to a wife she has no power of alienation unless expressly conferred.) Vide also *Hiraoti v Lakshman* 11 Bom 573. In *Dandekar v Parmanandji*

The same author declares the non-existence of dominion in the husband and others over *strīdhana* :

Neither the husband, nor the son, nor the father, nor the brothers have authority over *strīdhana* for taking it or giving it away. If any one of these consumes by force woman's property he should be made to restore it with interest and shall also incur a fine¹. If such a person were to consume it amicably after securing her consent, he would be made to restore the principal only, when he becomes well-off (able to pay). Manu (VIII. 29 and IX. 200) says :

On such² of their kinsmen as seize the wealth (of women) while they (the women) are alive a righteous king should inflict the punishment meted out to a thief. The heirs of the husband should not divide (among themselves) the ornaments worn by women during the lifetime of their husband. If they divide them, they become degraded (sinful)

Dhātāh means ' what was given to her by the husband and the like and was worn by her ' Devala says

Maintenance (what was given for maintenance), ornaments, *s'ulka* (bride price) and the profits of money-lending are her *strīdhana*. She alone is entitled to enjoy it and the husband is not entitled (to enjoy it) except in the case of distress. In the case of idle expenditure or consumption of it (the husband) should repay it with interest, but he may use the *strīdhana* (of his wife) for relieving the distress of his son.

Vitti means ' wealth given by the father and the like for her maintenance ' *Lābhah*³ means ' interest '. *Mokṣa* means ' expenditure & gift '. The word ' son ' (is illustrative and) implies the whole family. Yājñavalkya (II. 147) says

The husband is not liable to return, if he is unwilling, the property of his wife taken (by him) in a famine, for indispensable religious

7 Bom 155 at pp 164-165 this verse was relied upon for the proposition that a widow has absolute control over movables given by the husband or inherited by her. In *Seth Mulchand v Bai Mancha* 7 Bom 491 it was held that an absolute bequest by a Hindu of his separate immovable property to his widow confers on her as full dominion and power of alienation over that property as if the bequest had been made to a stranger and that the passage of *Nārada* had reference probably to a stage of progress in which the severance of an estate from the family was still looked on as impossible or at least as sacrilegious.

1 This verse is quoted in *Nathubhai v Javher* 1 Bom 121 at p 123. The three verses are ascribed to *Kātyāyana* in most digests.

2 This verse is quoted in *Nathubhai v Javher* 1 Bom 121 at p 123.

3 ' *Lābha* ' is variously explained. Sm O and Vir say that it means what is given to a woman when observing a *vrata* (such as one for securing the favour of *Pārvatī*), while V R explains it as ' what is received from relatives '. ' Idle expenditure ' means ' spending in gambling ' or on ' nautch parties ' &c. This verse of Yāj is quoted in *Nammalwar v. Perundevi* 50 Mad 941 at pp 944 and 946, where ' taken ' is said to mean not merely physical taking but ' taking and using ' and that if husband does not use, then the wife still remains the owner.

* P. 156 (text),

acts, in disease or while under imprisonment (by a creditor or by the king or by an enemy)

Here from the express mention of the husband it is (as good as) declared that one other than the husband should not take a woman's property even in such distress as a famine and the like. Dharmakāryam (religious act) means 'an indispensable one'. Sampratirodhake means in prison. Devala says that in certain cases (the husband) has to return (stridhana used by him) even if he be unwilling.

If the husband has two wives and he does not honour (reside with) her he should be forcibly made (by the king) to return (the stridhana of the ill-treated wife) even if she bestowed it upon him through affection. *Where food, raiment and residence are withheld from a woman (by her husband) she may exact (or demand) her own property (from the husband or his family) and the share (of the husband) from his coparceners.

*Rikthinā means from the coparcener. This text refers to a chaste wife, but an unchaste wife does not deserve a share. And to the same effect the same author says:

A wife who does acts injurious (to her husband) who is immodest who wastes property and who is given to adultery is not entitled to any wealth (of her husband¹).

The same author says²:

Wealth was produced for sacrifices; therefore one should employ it on religious objects and not spend it on women, fools and irreligious people.

Mānu (IX 195) thus declares the order of heirs, after a woman's death, in taking her (stridhana) wealth called *anvādikēya*³ (gift subsequent).

1. This verse is also ascribed to Kātyāyana. If we read *stridhanam* as one word as done in the text the meaning according to the Sm. C. is she is not entitled to use even her own stridhana according to her own wishes. From the context it seems better to separate as *stri* and *dhanam*.

2. This verse is quoted in the Mīt. which does not accept the position that all wealth is intended for sacrifices. Vide notes to V 31 pp. 237-238 for discussion of the position of the Mīt.

3. The Māyūka differs from the Mīt. in prescribing several different modes of succession to several kinds of stridhana. The Mīt. prescribes one mode for all kinds of stridhana except a *śulka*. The Māyūka prescribes four different modes viz (1) for *anvādikēya* and husband's gift of affection (2) for a *śulka*, (3) for technical stridhana other than that in 1 and 2, and (4) for non-technical stridhana. According to the Mīt. this verse of Mānu does not lay down a special rule (a *vidhi*) not found elsewhere but is only a re-iteration (*anvāda*) of what is already well known viz that when a woman has several daughters (who will therefore be full sisters) they succeed to their mother's stridhana (and sons do not take at all) but when there are no daughters at all then sons succeed to their mother's stridhana together. Others like the Māyūka, the Sm. C., the Y. R., the Vir. hold that this text of Mānu contains a special rule that daughters and sons succeed together to the *anvādikēya* stridhana and to husband's gift.

Anvādheya wealth and what was given to her by her husband through affection shall belong to her children, if she dies while her husband is alive. The same author (Manu IX. 192) particularises what is meant by *prajā* (children).

When the mother is dead, all the full brothers (sons of the woman deceased) as well as the full sisters should equally divide the maternal wealth.

The meaning (comment) of the *Mitākṣarā* (on this passage) is:—where owing to the non-existence of daughters it follows that sons become entitled together (to their mother's *strīdhana*), there they take together¹ (and divide equally), but *where it is only the daughters that are entitled to succeed, there they take together—this is merely what is repeated (by this text of Manu); but it does not lay down a special precept as to sons and daughters taking together (as heirs), which (rule) is unknown (from any other text). But others (writers) say that (this text) lays down a special rule not known from any other source, viz. that sons and daughters succeed together as regards *anvādheya* and husband's gifts of affection.

Manu declares¹ a special rule about sisters:

of affection. From the way in which the two views are set forth and comparing this with the way in which the *Mayūkhā* sets forth two views with the words 'pare tu' (as above p. 742 n 1) it is clear that *Nilakantha* favoured the latter view. In *Sitabai v. Vasantrao* 3 Bom. L R 201 the whole of the passage of the *Mayūkhā* commencing with Manu IX. 195 up to the text of *Kātyāyana* 'sisters having husbands should share with brothers' (*Mandlik's* translation p 95 l 17 to p 96 l 2) is quoted, it is held that *anvādheya* extends to gifts from parents as well as from husband, that *saudāyika* is not used in contradistinction to *anvādheya* in connection with succession, that property given by a will becomes *anvādheya* though wills were unknown to the *Mayūkhā* and that sons and daughters equally succeed to a woman's *anvādheya*. In *Dayaldas v. Savitribai* 34 Bom 385 the words 'others say &c' are quoted at p 390 and it was held that where a Hindu female governed by the *Mayūkhā* law died leaving property which she had inherited from her father under a gift after marriage and left daughters and a son, the property should be divided equally between them all, the unmarried daughters having preference over married ones. In *Ganga v. Ghasita* 1 All 46 (F B) it was held that unchastity does not incapacitate a daughter from succeeding to *strīdhana*. This was followed in 30 Cal 521. Vide *Hiralal v. Tripura Charan* 40 Cal 650 (F B) where it was held that mere leading a life of a prostitute did not sever the tie of blood and so a prostitute's property in the absence of nearer heirs passes to her brother's son. In *Tara v. Krishna* 31 Bom 495 a *murali* who leads the life of a prostitute and has children was held not to be a *kanyā* and was held entitled to succeed after all married and unmarried daughters. In *Jaya v. Manjanath* 19 Bom L R 320 it was held that property left by a *naikūn* descends to her daughter in preference to her son. Vide 1 Cal 275 for succession to *anvādheya* under *Dāyabhāga*.

¹ This verse is ascribed to *Bṛhaspati* by other digests and *Nilakantha* also seems to do the same lower down (text p. 160).

* P. 158 (text)

Strīdhana goes to (the woman's) children and the daughter is a sharer therein, if she be not given away (in marriage), but (a daughter) if married receives only (a little) in token of regard (for her)

Tadamsint (in the verse) means she is entitled to a share equal to that of the son, *apratīḍa* (not given away) means not married. The meaning is that when she (an unmarried daughter) exists the married one gets only a token of regard i. e. only some trifle. In the absence of unmarried daughters, married ones get a share equal to that of their brother since Kātyāyana says

Sisters having husbands should share with their brothers.

Something should be given to the daughter's daughters also since Manu (IX 103) says —

Even¹ to the daughters of them (the daughters) something should be given according to their deserts from their grandmother's estate, if there be affection

The *yautaka* (kind of *strīdhana*) goes to the unmarried daughters alone and not to the sons. To the same effect is the same author (Manu IX. 131)

Whatever is the *yautaka* (wealth) of the mother is the portion of the unmarried daughter alone

According to Madana *yautaka* is that which is obtained by a woman at the time of marriage or other (ceremony) when seated with her husband on one seat since the Nighaṇṭu² says that *yautaka* is (what is acquired) when the two (husband and wife) are joined together

*As regards the aforesaid technical *strīdhana* other than *anvādheya* and the affectionate gifts of the husband Gautama states a special rule *strīdhana* goes to daughters unmarried and indigent³

1 In *Skam Bihari Lal v Ram* 45 All. 715, a daughter's daughter was held to be nearer heir to *strīdhana* than a son's son. In *Ram Mohi v Gopal Devi* 45 All. 614 daughter's daughters were held entitled to succeed to the *strīdhana* of their grandmother irrespective of the question whether they were married or unmarried which latter consideration was held applicable to daughters only. In *Amarjit Upadhyay v Alga* 51 All. 478 the daughter's daughter was preferred to the daughter's son as heir to *strīdhana*.

2 Vide p. 85 n 2 above as to Nighaṇṭu.

3. The heirs to the technical *strīdhana* (other than *anvādheya* and husband's gifts of affection) are first unmarried daughters (to the exclusion of married daughters) then married daughters, among whom the latter exclude those who are well-to-do. In *Tilak v Basore* 1 L. R. 23 Bom. 220 it has been held that courts ought not to go minutely into questions of comparative poverty but that where the difference is marked, the poorest daughter takes the whole property. Vide *Mauli v Andan* 47 All. 403 also.

'Apiatisthitāh' (in Gautama) means 'devoid of wealth' (indigent).

The daughter of a brāhmanī wife however takes the wealth even of her step-mother,¹ as Manu says (IX.198) —

The wealth of a woman that may have been given to her by her father in any way shall be taken by the brāhmanī daughter or it may belong to her offspring.

The word 'vā' (or) is (here) used in the sense of 'and' and therefore it follows (that she takes) by dividing (with the issue of the ksatriya or vais'ya co-wife). Some say that the word 'brāhmanī' is illustrative of any daughter of equal or superior caste, but the authority for this (view) is doubtful.²

In default of daughters, the issue of daughters succeed, since Nārada p 189 v. 2) says.—

The daughters (take the wealth) of the mother; in the absence of daughters, the issue.

The allotment of shares in the case of daughters sprung from different mothers or daughter's sons (sprung from different mothers) is according to the rule laid down in 'in the case of sons of different fathers the allotment of shares is according to the fathers' (Yāj. II 120). As for the text of Yājñavalkya—(II 117) 'the daughters share the residue of their mother's property after (the payment of her) debts and in default of them, the issue,' there also, according to some, the word 'anvaya' (issue) means 'the issue of the daughter.' But others say that in default of daughters, the sons alone

1. Kullūka explains that where a brāhmana has wives of different castes, then if his wife of the ksatriya or vais'ya caste receives wealth from her father and dies, then the brāhmana's daughter born of his brāhmanī wife would solely succeed to the stridhana of her step-mother even if the latter has her own daughter or son and that the ksatriya wife's children would succeed only if the daughter of the brāhmanī co-wife be dead. Nīlakantha twists the meaning and takes 'va' (or) in the sense of 'and' and says that the issue of a brāhmanī co-wife would succeed equally with the issue of the ksatriya wife.

2. The view of some writers was that if a ksatriya had several wives of the same caste or one wife of the ksatriya caste and another of the vais'ya caste, then the daughter of the ksatriya wife would take the stridhana wealth of other wives of the same caste or the stridhana of the wife of the vais'ya caste, even though the vais'ya wife had a child of her own. Vide notes to Y. M. pp 294-295. The Mit. countenanced the view that the daughter of a ksatriya co-wife would take the stridhana of a vais'ya co-wife if the vais'ya co-wife died without issue. Nīlakantha does not accept this. According to him Manu's rule is strictly restricted to the daughter of a brāhmanī and in other cases the stridhana would go to the husband if the woman died without children or to her own children if any.

3. If there is no daughter, but there are grand-daughters born of different daughters or if there be no daughter or daughter's daughters but only daughter's sons then the estate will be divided into as many shares as there are daughters and the children of one daughter will together take the share that would have fallen to that daughter i. e. the division is *per stirpes* and not *per capita*.

take since in the text of Nārada (cited above) it is the mother alone that is pointed out by the pronoun *tat* ¹ This view is in agreement with (every day) usage. The words '*s'epam-ṛṇāt*' mean, according to men conversant with traditional usage, that the sons alone should take (the mother's property) when it is equal to or less than the debt (due by the mother)

In the absence of the daughter and the rest the sons, grandsons and the like should take since Kātyāyana says—

But on failure of daughters, her *wealth becomes the inheritance of the sons—

This (superior) right (of inheritance) of daughters and the rest in the mother's estate exists only in respect of the technical *strīdhana* previously enumerated in the words *adhyagni* (Manu IX 194), for if it (superior right of inheritance) related to all wealth whatever in which the mother has ownership then the technical terms (*adhyagni adhyavahanika* &c.) would be purposeless ² Therefore (it follows) that the texts above quoted containing the word ' *strīdhana* ' from Bṛhaspati, Gantama and others such as *strīdhana* shall belong to the children (of a woman) *strīdhana* goes to the daughters have reference only to *strīdhana* technically so called. Those texts again which though they do not contain the term *strīdhana* have the same

1. In the text of Nārada *tadanvayaḥ* occurs and in Yāj. (II 117) also *anvayaḥ* occurs and the question is whose issue is meant. The Mlt. explains Yāj. by connecting *anvayaḥ* with *mātuh*. Apastamba and Sm. C. connect it with daughter. The Dāyabhīga takes it in the same way as the Mlt. does. Nīlakaṇṭha follows the Mlt. and the Dāyabhīga. Vide notes to V M. p 200. *Sāmpradāyikāḥ* means men conversant with or following *sāmpradāya* (traditional usage). This refers to the Mlt. The rule of dharmaśāstra was that sons and grandsons were to pay off the debts of their father and mother. Vide Yāj. II. 60. The view ascribed to *sāmpradāyikas* is referred to in *Madhavrao v Ambabai* 20 Bom. L. R. 1210 at p. 1216.

2. Purposeless — No purpose would be served by separately defining *adhyagni* and the other kinds of *strīdhana*. The words in the absence of daughters purposeless are quoted in *Manilal Herwadet v Bas Deva* 17 Bom. 56 at p. 702 (foot-note) In this case a wife sued her husband at Ahmedabad for maintenance, got a decree for maintenance and for arrears and then died. The question was who was to be her representative in appeal, her daughter or husband, as the money was not technical *strīdhana*. Telang J. elaborately criticised the dicta of West J. in *Vijayarangam v Laksman* 8 Bom. II C. R. (O. C. J) 211 at p. 260 and Mr. Mayne's remarks in his work on Hindu Law and showed that both were wrong. Telang J. concludes As regards that property which does not class as woman's property in the technical sense the sons and the rest take precedence over the daughters and the rest (p. 76) and that the heirs to a *strīdhana* proper and *strīdhana* improper are identical, save that as between male and female offspring the latter have a preferential right as regards *strīdhana* proper while the sons have a similar right as to *strīdhana* improper. At p. 76 Telang J. remarks that sons and the rest means sons, grandsons, great-grandsons and no more. Vide also *Jhagjiribhai v Jhagjirao* 11 Bom. 243 (F. II.) at p. 210 for the significance of sons and the rest.

purport (as the texts of Brhaspati and Gautama which contain the term strīdhana) such as ' they should divide the maternal wealth ' (Manu IX. 192) have also reference to the same (viz. technical kinds of strīdhana), since there is brevity in assuming that all the texts have one basis (or origin)¹ As for the dictum of Yājñavalkya (II 117) ' sons should divide equally, after the death of the parents, the heritage as well as the debts, ' it refers to what is acquired by partition or cutting (sewing) and the like and is other than the technical kinds (of strīdhana). Therefore the sons and the rest alone should take the mother's wealth other than the technical one, even when there are daughters.²

On failure,³ however, of both kinds of issue, Yājñavalkya (II 144) states a special rule with regard to technical strīdhana :

Her kinsmen (bāṇdhavāh) should take it, when she dies without issue

The same author (Yāj. II 145) sets forth the succession of kinsmen according to the difference in the form of marriage :

The property of a childless woman (married) in the four forms beginning with *brāhma* goes to her husband, in the remaining (four forms) it goes to her parents; if she has given birth (to children) it goes to the daughters

* In default of the husband, (the person) nearest to her in the husband's family takes (the strīdhana) and in default of the father, (the person) nearest to her in the father's family takes (when marriage is in any

1. ' All the texts &c. '— All texts having the same purport, though some of them may not contain the word *strīdhana*, should be understood as referring to technical strīdhana.

2 The words ' As for the dictum daughters ' are quoted in *Manilal Rewadat v Bai Rewa* 17 Bom 758 at p. 762 (foot-note) and the sentence ' therefore the sons.. . daughters ' is quoted in *Bhagirthibai v Kalmugirao* 11 Bom. 285 (F. B.) at p. 810 In *Bai Narmada v Bhagawantrao* 12 Bom. 505 (a Gujarat case) it was held that, where a woman got in gift from a stranger a house and also some money, her widowed daughter-in-law succeeded in preference to her deceased daughter's daughter. In *Jankibai v Sundra* 14 Bom 612 (a case from Ratnagiri where the Mit. is supreme) it was held after quoting this passage of the Mayūkha that it did not apply and that the daughter would succeed in preference to the son where a woman inherited certain property from her father. In *Bai Raman v. Jagjivandas* 41 Bom. 618 the passage beginning with ' As for the dictum &c ' is quoted (at p 623) and it is held that non-technical strīdhana descends under the Mayūkha to a son in priority to a deceased son's son.

3. The whole of the passage from this sentence to the verses of Manu (IX. 196-197) is quoted in *Moosa Haji v Haji Abdul* 30 Bom 197 at pp 201-202. ' When she dies without issue-- ' this means ' without daughters, daughter's daughters or sons, grandsons or great-grandsons ', ' in the four forms '—eight forms of marriage were recognised by Manu III. 21, Gautama IV 4-11, Kaut. p 151 and Baud Dh. S. I 11. 1-9. They are *brāhma*, *daiva*, *ārṣa*, *prājāpatya*, *āsura*, *gāndharva*, *rāksasa* and *paśāca*. Manu (III. 24) and Baudhāyana say that the first four are the approved forms for *brāhmanas*, while Gautama (IV. 12) says in general that the first four are approved ones.

* P. 161 (text),

one of the four unapproved forms) since Manu (IX 187) in the words 'to whatever is nearest (to the deceased) sapinda, the estate of the deceased belongs declares propinquity with reference to the deceased as the determining principle in the matter of the right to take an estate. As regards the statement in the Mlt (on Yāj II 145) that on failure of the husband (stridhana) goes to the sapindas who are *tatpratyāsanna* and on failure of the father to the sapindas that are *tat-pratyāsanna* even there the word *tat-pratyāsannāh* is to be explained as 'tena asyāh pratyāsannāh' (nearest to her through him) i.e. nearest to her in his family through him (husband or father) as the door.¹ The words in the four (forms) beginning with *brāhma* refer to the *brāhmanas* on account of these (four) alone being lawful (or sanctioned) to them. In the case of *kṣatriya* and the like to whom the *gāndharva* form is lawful, the wealth

1. For an explanation of this passage vide notes to V M pp. 298-300. The words of Mlt. are *aprajāṣṭrīyāḥ oaturu virāḥovu dhanaḥ prathamā bhartur bhavati tad bhāve tat pratyāsannānāḥ sapindānāḥ bhavati*. To whom does the pronoun *tat* in *tat pratyāsannānāḥ* refer to *bhartur* (husband) or *strīyāḥ* (the deceased woman)? As *bhartur* is nearest *tat* should refer to him. The plain meaning is that in default of the husband, the *stridhana* goes to him who is nearest to the husband. At first sight it appears somewhat strange that the heirs to a woman's *stridhana* should be set out as those who are nearest to the husband (and not to her). But one has to remember that according to ancient writers a woman by marriage entered the *gotra* of her husband unless she was married in one of the unapproved forms or was made a *pāitṛī* (appointed daughter). In these last two cases she retained the *gotra* of her father even after marriage. Vide Mlt. on Yāj. I. 255. As she had the same *gotra* as that of her husband, his *gotraja sapindas* would be her *gotraja sapindas* also and so her heirs would have to be found in the husband's family (or in the father's family if she married in an unapproved form). The *Māyūkhā* states this clearly by saying *bhartur abhāve tatkule tasyāḥ pratyāsanno bhavati*. The *Māyūkhā* says that the same meaning can be extracted from the word *tat-pratyāsannāh* in the Mlt. by dissolving it as *tatpratyāsannāh* (near to her through him) and not as *tasya pratyāsannāh* (nearest to him). The *Māyūkhā* means that really there is no conflict between it and the Mlt. In *Munshi Ramdas v. Bai Renu* 17 Bom 768 at p. 764 it is said Nilsa-kapṣa finally lays it down that the *Mitāksharā* must be construed in a sense identical with his own opinion which is that the heirs to succeed are the heirs of the woman herself, though her heirs be the husband's family. Vide also *Gajabai v. Srimant Shaktajiro* 17 Bom 114 at p. 118 (where a woman's grandson by a cowdow was held entitled to succeed in preference to her co-widow or her husband's brother's son). In *Bai Kesurbai v. Bai Madogadai* 6 Bom L. R. 314 it was held in a case arising in the island of Bombay that a co-widow succeeded to immovable property given absolutely to a woman by her husband by a deed in preference to a nephew of the husband or his brother's widow. This is the same case on appeal as *Bai Kesurbai v. Hunsraj* in 30 Bom 431 (F. C.) = L. R. 33 I. A. p. 170. In *Parappa v. Shiddappa* 30 Bom 607 the full brother of the husband was preferred as heir to *stridhana* to a half-brother of the husband. In *Naras Pillai v. Sivalogapillai* 30 Mad. 110 the daughter of the co-widow was preferred to the *sapindas* of her husband such as the husband's father's brother's son. The passage from *Manu* as to 'up to in his family through him' is discussed in *Tularam v. Narayana* 26 Bom 520 (F. R.) at pp. 317-318 and is quoted in *Durao Vaid v. Sarat Chandra* 33 Cal 312 at pp. 317-318. According to the *Māyūkhā* the verse of Yāj. (II 145) does not apply to all kinds of *stridhana* but only to the *putula* variety of it.

also of a woman married in that form belongs to the husband only. To the same effect is Manu (IX. 196-197) :

Whatever property (a woman has) in the brāhma, daiva, āṛṣa, prājā-patya or gāndhāva forms, that is desired (ordained) as belonging to her husband alone when she dies without issue , but whatever wealth is given to her in the āsura and other forms of marriage that is desired as belonging to her mother and father when she dies without issue.¹

When the marriage is in the brāhma or other (approved) form and in default of the husband and when the marriage is in the āsura or other (unapproved) form and in default of the parents, Brhāspati speaks of persons who are entitled to take the technical *strīdhana* .

The mother's sister, the wife of the maternal uncle, the wife of the paternal uncle, the father's sister, mother-in-law, the wife of the elder brother-these are pronounced as equal to the mother. When these leave no son of the body nor daughter's son nor the son of these (i.e. of the *aurasa* &c), their sister's son and the like would take their wealth² ,

1. For definitions of the eight forms vide Manu III. 27-34 and Yāj I. 58-61. In modern times the only forms recognised are *brāhma* and *āsura*. The essence of the *āsura* form is that a bride-price is to be paid to the father or other relative who gives away the bride in consideration of the money. Vide *Jaisandās* v *Harkisandas* 2 Bom. 9 at p. 18 for the essential characteristic of the *āsura* form and *Hira* v. *Hansy* 37 Bom 295. The general rule is that a marriage is to be presumed to have been in the *brāhma* form and this presumption will apply even to s'ūdras, if the parties belong to a respectable family. Vide *Jagannath* v *Narayan* 34 Bom 553 at p 555. In *Authikesavalu* v. *Ramanujam* 32 Mad. 512 it was held that the *āsura* form is not the approved form even for s'ūdras though it is permitted to them and the verse of Yāj (II 145) is quoted at p 518. The mere giving of *Paku* does not constitute an *āsura* marriage (vide 2 Bom 9). The presumption that marriage is in the *brāhma* form applies even to those Mahomedans who are governed by Hindu Law in matters of succession and inheritance. Vide *Musa Haji* v *Haji Abdul* 30 Bom 197 (where marriage among Cutchi Memons was held to be in the *brāhma* form) 'Belonging to her mother and father'--According to the Mīl the mother would be preferred to the father, while according to the Mayūkha the reverse would be the case.

2. 'When these'-this means women who own *strīdhana* property. The *Dāyabhāga* takes *aurasa* and *sula* separately, the first meaning 'child, son or daughter' and the latter meaning 'a dattaka son or the like'. It then says that these verses do not prescribe that the sister's son succeeds as the most preferential heir to a woman's *strīdhana* after her own issue and descendants, but they simply declare that the sister's son is an heir and may take if no nearer heir like the deceased woman's husband's younger brother exists. The *Vīramitrodaya* says on the other hand that on account of these verses the sister's son would succeed in preference to the husband's brother or father. In *Bachha* v *Jugmon* 12 Cal 348 at p 355 Brhāspati's text is discussed and the Mayūkha is referred to (husband's brother's son preferred as heir to a widow's *strīdhana* to her sister's son). In *Dasharathi Kundu* v *Bipin Behari* 32 Cal 261 Brhāspati is quoted (on p 262) and it is said that though this verse does not lay down the order of succession yet following the express words of the *Dāyabhāga*, the step-sister's son must be preferred to husband's elder brother. In *Debi Prasanna* v *Harendra Nath* 37 Cal. 863 husband's younger brother was preferred as heir to a woman's *ayautaka* to her own step brother. Vide 40 Cal. 82. In *Gajabai* v,

*Here (in this passage) the absence of the daughter and the daughter's daughter is to be understood, since the son of the body and the daughter's son are entitled to take (*stridhana*) only in default of them.

In respect of property given by *bandhus* (cognate kindred) in *drura* and other (unapproved) forms of marriage *Kātyāyana* says

That which was given (to a woman) by her *bandhus* goes on failure of the *bandhus* to her son.¹

As to *s'ulka*, however *Gautama* (says) the sister's *sulka* belongs to her full brothers and afterwards to her mother.²

As to what *S'aṅkha* says the *sulka* belongs to the bridegroom himself that must be understood (to relate) to a woman who dies before (the actual) marriage. Here *Yājñavalkya* (II 146) states a special rule

If she dies (after betrothal) the gifts (given to her) should be taken (by the bridegroom) after deducting the expenses of both sides (therefrom)

The meaning is the husband (the bridegroom) may take (back) if the (betrothed) girl dies the *sulka* already given by him to her that remains after (deducting therefrom) the expenses incurred by himself and by her father. *Baudhāyana* states a special rule as to certain matters

Śrīmat Śaṅkharāo 17 Bom. 114 at p. 123 it was held that the list does not state the order of succession as between the heirs enumerated. In *Dal Karamdas v Harnaraj* 20 Bom. 431 [P. C.] this text is construed as not laying down any order of succession and it is said that the list is not exhaustive and that its true construction is that it should be taken distributively viz. the husband a relations will succeed if the marriage is in an approved form and the father a, if in an unapproved form. At p. 444 *Bṛhaspati* is quoted and at pp. 446-451 three constructions are discussed. In that case a co-widow was preferred to husband a brother or his brother's son. Vide *Sundaram v Ramaswami* 48 Mad. 37 at p. 80 for a discussion of *Bṛhaspati*'s text (which was held not applicable to a maiden).

The son of the body &c. — the *owraas* son and daughter's son are expressly mentioned by *Bṛhaspati*, but the daughter and daughter's daughter are not mentioned; yet they are to be implied in this passage as the son himself comes after the daughter and daughter's daughter as an heir to *stridhana*.

1. The *Dāyabhāga*, *Vir Sm. C.* read goes to her husband and the *Dāyabhāga* says that this text applies to *s'ulka*. The *Sm. C.* takes the words to apply to the *stridhana* of a woman married in a form other than the five mentioned by *Manu* (IX. 190).

2. This *sūtra* is differently interpreted by different writers. The *Mit.*, *Sm. C.*, *Par. Sm.*, *Vir* interpret as above. *Haradatta* (on *Gautama*) says that full brothers take it after the mother i. e. the mother takes first. *V. R.* follows *Haradatta*. *S'ulka* is explained by *Kātyāyana* above (178)

The wealth¹ of a deceased maiden may be taken equally by her full brothers, on failure of them, it belongs to her mother and in default of her, it belongs to the father.

Those conversant² with traditional usage say that this (text) relates to ornaments and the like presented by the maternal grandfather and the like at the time of betrothal to a girl who dies before (the actual celebration of) marriage.

Now (begins) the treatment of those who are excluded from a share (or inheritance).

Yāj (II. 140) says

An impotent person, a *patita* (one who is an outcast for some grave sin) and one born of him, a lame man, a mad man, an idiot, a blind man and one afflicted with an incurable disease are not entitled to a share and are to be maintained (only)³

1. This is referred to in *Gandhi Maganlal v Bar Jadab* 24 Bom 192 (F.B) = 1 Bom. L R 574 where a paternal grandmother inheriting from her maiden granddaughter was held to have taken the estate absolutely which she could dispose of by will In *Jangluba v. Jetha* 32 Bom 409 the text of Baudhāyana is quoted at p 411 and it was held that to the wealth of a maiden of the Kamathi class in Poona her father's mother's sister was a preferential heir to the maiden's maternal grandmother. In *Tukaram v. Narayan* 36 Bom. 939 (F B.) the father's sister was held to be a preferential heir of a maiden to the male gotraja sapindas of her father five or six degrees removed The principle is that the nearest heir of the father is the heir of the maiden. Vide *Kamalabai v. Bhagirthubai* 38 Mad. 45, *Sundaram v. Ramaswami* 43 Mad 32, *Dwarkanath v Saratchandra* 39 Cal 319.

2 ' Those conversant with &c ' -- This refers to the Mit, ' betrothal ' --the original word is ' vāgdāna ' which literally means ' gift by words '.

3. Act XII of 1928 abrogates all] grounds of exclusion from inheritance except lunacy and idioey from birth The act, however, does not apply to those cases which are governed by the Dāyabhāga In numerous reported cases this text of Yāj and the texts of Manu and other sages have been quoted and interpreted, but in view of the recent legislation referred to above, it is not necessary to go into them in great detail Besides act XXI of 1850 (Caste Disabilities Removal Act) had already abrogated the ancient Hindu Law as to loss of rights to property or rights of inheritance by reason of a man's renouncing his religion or by reason of his being deprived of caste for breaches of rules observed by the caste in which he was born Vide *Gangaram v. Ballia P J* for 1876 p. 31 where the V M. is referred to (at p 32) as to an outcast Vide also *Murari v Parvatibai* 1 Bom 177 at pp 179-180 (where both Yāj and Manu are quoted) ' A patita ' --Vide *Gangu v Chandrabhagabai* 32 Bom 275 as to a murderer being disqualified to inherit to the person murdered by him (at pp 290-291 texts and the Mayūkha about wives of murderers) and *Kenchava v. Girmallappa* 48 Bom 569 P C.=51 I.A. 367 (where 32 Bom. 275 was distinguished) The degradation of a daughter on account of incontinence does not put an end to her right to inherit the strīdhana property of her mother, as held in *Angammal v. Venkata* 26 Mad. 509, (512) and in *Ram Pergash v. Mussammatal Dahan Bibi* 3 Patna 152 (at p. 178.) it was held that conversion to Mahomedanism before the succession opened did not cause

1 * *Tāyāh* (in Yāj) means born of him who is *pātita* (an outcast). Those that become endowed after partition, with virility and the like (the absence of which led to exclusion) by means of medicaments and the like, do take a share like (i.e. on the analogy of) a son born after partition. Manu says (IX 201)

'The impotent and the outcast (*pātita*) are not entitled to a share and so are persons born blind and deaf also a lunatic, an idiot, one dumb and such as are destitute of (the use of) a limb (or sense)' *Nirindriyāh*

loss of sight by virtue of Act XXI of 1850. Vas. 18, 51 says that the progeny of one who is *pātita* becomes *pātita* (except female children). A lame man — In *Venkata Subba Rao v Purushottam* 20 Mad. 183 it was held that lameness which was not congenital could not be a bar to the right of inheritance and a doubt is expressed whether even congenital lameness would be a bar. A mad man — In 12 All. 590 it was laid down that the rule disqualifying persons as idiots or mad men should be enforced only on the clearest and most satisfactory proof and does not disqualify persons who are merely of weak intellect i.e. are not up to the average standard of human intelligence. In *Narasim v Parayathal* 1 Bom. 177 there is an obiter dictum of Westropp C.J. that insanity in order to operate as a ground of exclusion must be congenital, like blindness but this dictum is disavowed from in *Bapaji v Datta* 47 Bom. 707 vide also *Mukundaji v Mennamall* 43 Mad. 481 where all texts and authorities are considered. Insanity whether curable or incurable excludes from inheritance vide 5 All. 500 (F B). A blind man — In *Umabai v Dharm* 1 Bom. 557 it was held that incurable blindness, if not congenital does not lead to exclusion. The same was held by the P. C. in *Ganeshwar v Durga Prasad* 45 Cal. 17 = L. R. 41 I A 272 (at p. 284 the verse of Manu is quoted). In *Pudiar v Perumal* 45 Mad. 910 (F B) it was held that blindness must be congenital in order to exclude from inheritance.

2 1 This sentence is quoted in 2 Mad. 64 (F B.) at pp. 68 and 74 and in 45 Mad. 4 (at p. 2 the *Mayūkha* is quoted). This may apply to partition, but it cannot apply to inheritance. When property has once become vested in a person by inheritance owing to the exclusion of another on the ground of mental or bodily defect, it cannot be divested by the subsequent removal of the defect. Vide 5 All. 500 (F B).

2. This verse of Manu is quoted in 1 Bom. 177 at p. 170 and in *Anant v Ramasai* 1 Bom. 551 (at p. 550) in the former of which (at p. 185) *nirindriya* is explained. In 45 Mad. 4 (at p. 12) that word was explained on the analogy of the Vedic passage *tasmat śrīya nirindriyā* as meaning devoid of sufficient capacity and mental strength in the organs of sense. One dumb — In *Dharmappa v Ujjayanda* 46 Bom. 405 it was held that a person suffering from congenital and incurable dumbness was excluded from inheritance (at p. 47 the *Mayūkha* is referred to). Vide also *Sarathi v Jhankar* 23 Bom. L. R. 64 (at p. 60 *Mayūkha* is referred to) and *Pratapgar v Mahankar* 26 Bom. L. R. 209 (where it was held that dumbness in order to bar must be incurable though not necessarily congenital). In *Narasim v Sundarappa* 51 Mad. 66 at p. 685 the learned judges dissent from 46 Bom. 405 and hold that where a man is suffering from an incurable and virulent form of leprosy the father can adopt a son. Institute of a limb or sense — In *Anant v Ramasai* 1 Bom. 551 it is said (at p. 557) that the word *nirindriya* even in its more extended sense of the loss of a sense organ or limb could not be properly applied to leprosy and that leprosy in order to exclude must be of the virulent or ulcerous type (but need not be congenital). Vide as to leprosy *Janki v Janki* 2 Bom. L. R. 1147 *Laxman v He* as at 46 Bom. 551 F. C. (at p. 551 I A 277) and 50 Cal. 601 at p. 608 (where it is said that the text of *Devala* quoted by the *Yāj.* *Uttara* and that of *Yajna* are the only texts where leprosy are expressly excluded).

(in Manu) means ' devoid of the sense of smell and the like. ' Nārada (p. 194 vv. 21-22) says :

One hostile to one's father, a *patita*, an impotent person, one who goes to another continent (from India in a vessel). these even though they be *aurasa* (sons of the body) should not get a share ; how can *ksetrāja* sons (suffering from these defects) get a share ? Persons afflicted with long-standing and severely painful diseases, persons who are either idiots, insane or lame — these must be maintained by the family, but their sons are entitled to a share

' *Apayātrita* ¹ ' according to Madana means ' one who is excommunicated by his kinsmen ' on account of his being guilty of high treason or the like by the method of breaking a water-pot or the like , but it is better to take the word to mean ' one who goes across the sea in a vessel or the like to another continent ' (than Jambudvīpa, India) for trade ; because contact with such a person is prohibited in the Kali age by the text ' a twice-born person who crosses the ocean in a vessel is not to have intercourse (with his castemen) even though he be purified ' (by appropriate *piṇḍaśānti*) and because breaking of a water jar and excommunication are not prescribed in the case of high treason. S'ankha-~~and~~ Likhita say ' inheritance, *ṇḍa* (ball of rice) and water are withheld (lit. cease) from the *apayātrita* (one who goes on a sea voyage to a distant land) '. Vasistha says (17. 52) ' those who have betaken to another order of life (other than the householder's order) are excluded from a share ' This means that the perpetual student, the forest hermit and the *yati* (are excluded from a share).²

1 There are numerous readings for this word, such as ' *apapātrika* ', ' *aupapātika* ', ' *avapātitā* ' &c Vide my notes to V. M pp 305-306 for these and their explanations and *Dal Singh v. Musammāt Dm* 32 All 155 at p. 158 where most of these are discussed. Nilakaṇṭha is wrong in saying that breaking of a water jar is not prescribed for high treason. Gautama 20. 1-4 does prescribe ' *ghaṭasphoṭa* ' in such a case. Compare Manu XI 183-184 and Yāj. III. 295 also. The half verse ' a twice-born person &c. ' is quoted by Hemādri from the *Ādityapurāṇa* in his list of acts forbidden in the Kali age. Vide p 104 above about secondary sons being forbidden in the Kali age There is a sharp conflict about the meaning of ' *apayātrita* ' which, according to strict rules of grammar, would mean ' who habitually crosses the sea in a vessel ' (and not one who makes a casual voyage). Vide my notes to V. M. p. 306. The verse of Nārada ' persons afflicted &c. ' is quoted in 1 Bom. 177 at p. 182.

2. An ordinary student (called *upakurvāṇa*) intends to become a householder and so he is not excluded. ' *Yati* ' means a *sannyāsin*, an ascetic who has given up worldly ties. In *Somasundaram v. Varthilinga* 40 Mad 846 it was held that the texts as to disinheritance applicable to *yatis* or *sannyāsins* did not apply to a s'ūdra ascetic unless a usage to that effect was established. Vide also 46 All. 616, 39 Bom. 168 at p 174, 52 All. 789. In 54 Mad. 576 at p. 581 reliance is placed on the *Mayūkhya* which quotes S'ankha-Likhita that the heritable right of him who has been formally degraded (*apapātrita* is the reading accepted) and his competence to offer oblations of food and libations of water are extinct.

Kātyāyana says

The son of a woman married in the wrong order and one who is born of a man of the same gotra (as the man's wife) and one who is an apostate from the order of ascetics—these never obtain the inheritance¹

*Sagotrāḥ (in Kātyāyana) means one born from a woman married by one who has the same gotra as her (i.e. as her father's). Akramodhastuḥ means according to some *kṣetrāja* or *kāṇina* son and the like but it is more proper to say that when a younger daughter gets married while her elder sister is still unmarried, they both are then designated by the word *akramodhā*². The same author (Kātyāyana) declares that if he (the son of an *akramodhā*) be of the same class (*varṇa*) as his father's he was entitled to a share

The son of a woman married in the wrong order takes the inheritance when he belongs to the same class as his father and so does a son born of a woman who is not of the same class (as her husband) but who is married in the proper order³

A son born of a woman who is married in the reverse order is not entitled to a share though he be procreated by the husband himself⁴. And so the same author (i.e. Kātyāyana) says

The son of a woman married in the reverse order (of classes) is not entitled to inherit (to his father). It is the opinion (of sages) that food and raiment should be given (to such a son) till his end by his kinsmen.

When there are other sons endowed with good qualities Manu (IX 214) declares that the vicious son is not entitled to a share (of the inheritance)

All those brothers who are addicted to vicious acts are not entitled to the estate.⁵

1. Vide my notes to V. M. pp. 807-808 and Kāt. verse 863 for the several explanations of this verse. A younger brother or sister marrying before an elder one was guilty of the sin of *parivedana*. The younger one so marrying was called *parivettya* and the elder one so passed over was called *parivitta* or *parivina*. These two as well as the giver of the girl and the priest incurred grave sin. Vide *Band. Dh. S. II. 1 80* and *Manu III. 172*. There is another meaning of *akramodhā*. In ancient times a person was first to marry a girl of his own caste and then he could marry another of a caste lower than his own (*Manu III. 12*). But if a *brāhmana* married first a *kṣatriya* girl and then a *brāhmana* girl, both became *akramodhā*.

2. For explanation of *kṣetrāja* and *kāṇina* vide p. 103 above.

3. The last half may be illustrated as follows—If a *kṣatriya* first married a girl of his own class and then married a *vaiśya* girl, the son of the latter would take a share as he would be born of a woman married in the proper order though his mother is of different class from her husband's. Vide 144. II 123.

4. If a *kṣatriya* married a *brāhmana* girl and had a son from her this would be the son of a *pratiṣṭhāna* union and so he would not be entitled to inherit to his *kṣatriya* father.

5. Compare *Gautama 23, 25* and *Āp. Dh. S. II. C. 11 31-35*.

² P. 104 (text).

Bṛhaspati (p. 376 vv. 42-43) says .

Though born of a woman equal in class (to her husband) a son destitute of good qualities does not deserve the paternal wealth ; it is ordained that it (paternal wealth) belongs to those (sons) who are learned in the Vedas and who offer *pinda*s to the deceased. A son rescues his father from highest and lowest debts ; hence no purpose (use) is served by a son who is the reverse of this ¹

These persons excluded from a share (or inheritance) must be maintained during their life by those who take the inheritance ; since Manu (IX. 202) says :

But it is just that the wise should give, according to their ability, food and raiment till the end (of their lives) even to all (who are excluded) ; for he who does not give (these) would become *patita* (sinful and outcast)

* ' Atyantam ' (in Manu) means ' as long as they (excluded ones) live '. And to the same effect is the text of Yājñavalkya (II 140) cited already ' they are not entitled to a share and are to be maintained '. But those who have betaken themselves to another order (other than that of householder), those who are outcasts and the sons of outcasts are not entitled to be maintained. And to the same effect is Vasistha (17. 52-54) ' persons who have entered into another order (ās'rama) are not entitled to a share ; and so are not entitled the impotent, the lunatic and the *patita* (out-cast) ; maintenance (must be given) to the impotent and the lunatic. ' Here the express mention of two as regards maintenance serves to exclude the other two ² Devala says .

³ When the father is dead, the impotent, the leper, the lunatic, the idiot, the blind, an outcast and his offspring, a person wearing a heretical sect mark — these are not entitled to a share of the heritage ; to these,

1 Mandlik translates ' a son relieves his father from creditors and debtors '. But this is doubtful. No ancient writer, so far as I know, gives credit to a son as the saviour of his father from the latter's debtors. Manu IX. 198 says that the son saves the father from the hell called ' put '. The higher debts are those that are owed to the gods, manes and sages (as said in the Taittirīyasamhitā VI. 8. 10. 5) and the lower debts are the debts owed to creditors. The Aitareya-brāhmaṇa (VII. 13) says that when a man sees a son born to him he pays back a debt.

2. Vasistha mentions four, viz ' ās'ramāntaragata ', ' klība ', ' unmatta ' and ' patita ' as ' anams'a ' and allows maintenance only to the impotent and the lunatic. This means that ' ās'ramāntaragata ' and ' patita ' are not entitled even to maintenance. As to ' parī-samkhyā ' vide p. 106 n 2 above.

3. This text of Devala is quoted in 1 ' Bom, 177 at p 188 ' ' When the father is dead ' —this is only illustrative. Even when the father is living and he makes a partition during his lifetime or sons come to a partition during his lifetime, the persons enumerated would be excluded.

* P, 165 (text),

except the outcast boiled rice (i.e. food) and raiment are to be given.

'*Uṣṭi*' (in Devala) means one who wears a forbidden sign ¹ Baudhāyana says (II. 2 88 41) 'They (coheirs) should support with food and clothes those who are beyond (i.e. incapable of) transacting business and those who are blind idiots, one impotent one addicted to vice, one afflicted with diseases and those that engage in prohibited actions except the *patita* and his issue' ² Madana and others say that one who is an apostate from the order of asceticism and his sons also are not to be maintained

The sons ³ however of those excluded from a share (or inheritance) if they are blameless (free from defect &c.) do get a share because Viṣṇu (15. 84-88) says the *aśramā* (legitimate) sons of these alone are entitled to take a share but the sons of the *patita* born after the commission of the sinful act (which causes the bar of the exclusion) do not (take a share) and so also those who are born of women of higher caste (than their husbands) do not take a share nor do the sons (of these latter) take a share even in the wealth of their paternal grandfather⁴ and because Yājñavalkya (II 141) says 'the *aśramā* (legitimate) and *kṣetrāja* sons of these if free from blame, are entitled to a share'

*Yājñavalkya states (II 141 142) a special rule concerning the daughters and wives of these (excluded persons)

1. The *Dīyabhāga* and *Vir* explain *Uṣṭi* as *pravrajita* (the sannyāsin) the explanation of *Nīlakaptha* is supported by Medhātithi's comment on Manu IV 80.

2. The text of Baudhāyana is quoted in 1 Bom. 177 at p 183. *Atiavyavahārin* may also mean those who transgress the ordinary rules of conduct

3. In *Dapuji v Panduranga* 6 Bom. 616 it is said at p. 621 Admittedly not one of the books referred to lays down anything with respect to the rights of inheritance of after-born qualified sons of excluded persons where an estate has already vested in a member of the family by right of survivorship In *Krishna v Sami* 5 Mad. 61 (F.R.) it was held that the sons of a deaf and dumb member of an undivided Hindu family are entitled to a share in the lifetime of their father notwithstanding the fact that they were born after the death of their grandfather Vide *Laxman v Krishnaji* 21 Bom. L.R. 427 for the adopted son of a *patita* succeeding to his father's separate property though the adoption took place after the father became *patita*. Vide *Paradara v Venkatesh* 51 Bom. 444

4. The force of *api* in *patitānshēparibh* is as follows. The general rule is stated to be that the blameless sons of those excluded take a share an exception to this is the son of a *patita* born after the man became *patita* and there is a further exception we saw above from Baudhāyana's text that the son of a *pravrajita* and so on does not inherit to his father the blameless son of the son of a *pravrajita* and so on would not succeed to the wealth of his grandfather i.e. of him who married a woman of a higher caste than his own

5. The impotent particularly may have a *kṣetrāja* son Vide Manu IX. 203. TL. Mtl. says that the expression *aśramā* and *kṣetrāja* shows that other kinds of sons (of those excluded from inheritance) are not entitled to a share or to inherit. The *Law Commission* says that as *kṣetrāja* is forbidden in the Kātyāyana the text of 141 applies only to the *Dīyama* and

The daughters of these (excluded persons) should be maintained till they are married and their sonless wives leading a virtuous life should also be maintained; but the unchaste ones should be expelled and so also those who are hostile.

According to Madana and others in the case of unchastity, they (the wives of excluded persons) should be expelled and not fed, when they are hostile they should be (only) expelled but maintenance must be given to them.¹

(Here) ends the (section on) partition of heritage.

Now begins (the section on) recovery of debts. ²

Hereon Bṛhaspati (p 319 v 1) states the procedure to be followed by the creditor in lending money :

A creditor should always advance a loan after securing a pledge of adequate value or a hypothecation or substantial sureties or have it consigned to writing or before witnesses.³

'Bandha' means a restrictive agreement (by the debtor) in the form 'so long as the debt due to you is not discharged, I shall not enter into a transaction of gift, sale or mortgage of this house, field or other thing.' Lagnaka ' means ' a surety '. The same author (Br p 320 v. 2) says .

*Since it (loan) is recovered without any qualm four times or eight times (as much) from a wretched man who is sinking (distressed), it is therefore known as *kusīda* (usury) ⁴

1. The Mit. says that merely because they are hostile they should not be deprived of maintenance if they are chaste. The V. R. remarks that 'pratikūla' does not mean 'quarrelsome' but connotes hostility (such as attempt to poison &c.). Vide *Valu v. Ganga* 7 Bom 84 at p. 88 where the verse of Hārīta together with the comment of Mayūkha is quoted and also *Itata Shavitrī v. Itata Narayanan* 1 Mad H. O. R. 372 where the Mayūkha is quoted in a note.

2 There are, according to Nārada, seven heads to be discussed under the title of 'recovery of debts', two from creditor's point of view (viz the method of lending and the manner of recovering) and five from the debtor's point of view (viz what debts must be paid, what debts need not be paid, who is liable to pay debts, at what time, and in what manner)

3. Vide notes to V. M pp 318-319 for the various definitions of *ādhi* and *bandha*. The two words are often used as synonyms. Bṛhaspati himself defines 'ādhi' as *bandha* later on (under 'pledge'). 'Ādhi' is here distinguished from 'bandha' and means 'a pledge or mortgage with possession' while 'bandha' seems to be a simple mortgage or hypothecation, where the creditor is not given possession and the thing remains in the possession of the debtor or a common friend. Vide Mit on Yāj. II. 59.

4. This gives an etymology of, 'kusīda' from 'ku' (bad) and 'sīda'.

* P. 167 (text)

Kātyāyana says

That rate of interest which the debtor promised in addition (to the rate allowed by *śāstra*) and which was promised in a time of difficulty (or distress) must always be given, it is termed *kāṛitā* that is known as *śikhā-vṛddhi* (interest growing like the top-knot of hair on the head) when (the debtor) pays (interest) every time.¹

Pratikālam (in *Kāṭ*) means from day to day from month to month and from year to year *Yājñavalkya* (II 37) says

An eightieth part (of the principal) is the interest every month when (a loan is advanced) on a pledge otherwise (when money is lent without a pledge) interest may be two three four or five percent (every month) in the order of the (four) classes (*brāhmaṇa* *kṣatriya* &c.)²

'*Anyathā* (in *Yāj*) means when there is no pledge *Vyāsa* says

Monthly interest is declared to be an eightieth part (of the principal) when there is a pledge, sixtieth part when there is a surety (but no pledge) and two per cent when there is no pledge nor surety

Yājñavalkya (II 38) says

(Borrowers) who travel through forest (for trade &c) should pay ten per cent and those who travel by sea twenty per cent (per month)

Dadyuh is to be understood as connected (with this verse) from the following clause (in *Yāj*)

All of whatever class should pay the interest stipulated by themselves *Viṣṇu* (Dh. S. VI 40) says *

He who having taken a loan of whatever kind with the promise 'I shall return an equal amount tomorrow does not afterwards return it through greed, would have to pay interest from that day³

Kātyāyana declares when interest can be charged on a loan (of an article for use) *

1. Interest is either *krta* (agreed upon between the parties) or *akṛta* (not so agreed). According to *Gautama* VII 31-32 and *Bṛ* p. 32 = vv. 5-11 *krta* is of six kinds: *kṛtyikā*, *kālikā*, *cakravṛddhi*, *śikṛā*, *śikhā-vṛddhi* and *bhogalīkha* (*Gautama* calls his sixth variety *śikhābhog*). *Manu* VIII 163 and *Nār* (p. 66 vv. 102-104) mention the first four out of the above six. Vide notes to V M pp. 313-314 for the explanation of all the six.

2. As the eightieth part was to be given every month, the interest comes to 12 percent per annum. When there was no pledge, a *brāhmaṇa* debtor had to give 21 per cent per annum, a *kṣatriya* 15 per cent per annum and so on. *Manu* VIII 160 describes the rule about eightieth part to *Vasīṣṭha*. Vide *Manu* VIII 162 which prescribes two, three four and five per cent just as *Yāj* does.

3. These and the following verses contain cases where no interest is originally stipulated, but where the law allowed interest to be charged in certain circumstances.

When ¹a person takes a loan for use (yācitaka) and goes to another country without returning it, that loan begins to carry interest after a year (from the date of loan). He who after borrowing money goes to another country without returning it even though he be requested (to repay), that loan carries interest after three months (from demand). When a person does not return (a loan) at any time even though he be in the country and even when he is requested to return it, (the king) should make him pay interest from that day (i. e. day of demand) though none was stipulated and though he is unwilling to pay.

Nārada (p. 68 v. 108) says :

There shall be no interest in any case where things are lent through friendship, in the absence of a stipulation (to that effect) but even when there is no stipulation such a loan carries interest after half a year.

Kātyāyana says

What² has been lent through friendship carries no interest as long as it is not demanded back; but if it be not returned even though it is demanded back, it bears interest at (the rate of) five percent (per month). If³ a man, after buying a marketable commodity, goes to another country without paying the price, that money (price) will earn interest after three rtus (10 after six months).⁴ A deposit, the balance of interest, purchase and sale—these bear interest at five percent (per month) if they are not returned (or paid) when demand is made.⁵

Nārada (p. 98 v. 36) says :

The price of a commodity (sold), wages, deposit, a fine that is ordained (inflicted), a promised gift without consideration, a stake won in gambling by means of dice—these do not carry interest without an express agreement.⁶

1. Vide notes to Kātyāyana vv 502-504. The first verse of Kāt. applies when the lender makes no request for return, the second where he makes a request. The three verses are quoted in *Saundaranāya* v. *Shitbasawa* 31 Bom 354 at pp 361-362.

2. This verse is referred to in 31 Bom 354 at p. 361 and it is said (at p. 364) that it was an incident annexed to every contract of debt by the Hindu law that interest though not stipulated for should run on it in the event of non-payment after demand from the date of such demand.

3. This applies where there is no demand for the money.

4. 'Purchase and sale'—If a chattel is purchased and the purchase money is not paid even though demanded, this verse would apply and interest would run from the date of demand.

5. 'A promised gift'—a gift to dancers or bards is called *vrthā dāna*. This verse is apparently in conflict with Kātyāyana's verse 'a deposit' &c. so far as deposit and the price of goods are concerned. But Nārada's verse applies where there is no demand and Kātyāyana's verse applies where there is a demand.

* P. 169 (text)

Ākṣika (in Nārada) means relating to playing with dice , **avita kṣatāh** means not specially agreed upon **Yājñavalkya** (II 44) says ;

If (a creditor) does not receive back his own money given as a loan when it is tendered (by the debtor) it carries no interest from that (day) if it be deposited with a third person

Bṛhaspati (p 823 v 18) says

On gold (and silver) the interest (allowed by s̥āstra) is as much as (to make the debt) double, on clothes and the baser metals treble on grain, quadruple so also on vegetable products beasts of burden and wool (or hair).

S'adāh (in Bṛhaspati) means flowers roots fruits and the like **vāhyah** means bullocks and the like **Lavaḥ** means the wool of sheep and hair of camari deer and the like. "As to what Manu (VIII 151) says interest on grain vegetable products, beasts of burden and on hair does not exceed five times (the principal) its purport is to prohibit taking six times as much (as the principal) or more "

Kātyāyana says

The interest stops at double (the principal) in the case of jewels, pearls, corals gold and silver and in the case of fruits silken cloth and wool.

Kaiśam (in Kāt) means produced from a **kṛtā** (insect) such as the cloth called **paṭṭa**, a **dukūla** and **tasari** (which are several varieties of silk cloth) **Vasistha** says

Interest on copper iron bell metal, brass, tin and lead is threefold if the debt be of long standing

Vyāsa says

(Maximum) interest in the case of vegetables cotton and seeds is declared to be six fold

Kātyāyana says

For all sorts of oils for liquors and ghee the (maximum recoverable with) interest should be known as eightfold and also in the case of raw sugar and salt

Vṛāṇ (Dh. S. VI 11 15) says In the case of gold (the maximum recoverable with) interest is two-fold on cloth treble on grain quadruple on fluids eight fold in the case of female slaves and beasts the offspring (is the interest) ' Flowers roots and fruits and what is sold by (being weighed in a) balance—in these (the increase by interest) is eight-fold (these are **Vasistha** II 46 17). **Nārada** (p. 67 10c) says

1 Compare Gautama XII.23 with Manu V 111 151 Yājñ 11.23 agrees with Bṛhaspati For various explanations of the text of Manu vide notes to V 11 p 517

2 It is possible to take **striṇaḥ** **prīmā** to mean female beasts (such as a she-buffalo)

P' 170 (text).

This* is declared to be the universal (all-embracing) rule as to interest on loans; but the established usage of each country may be different and may prevail according to the nature of the debt¹

' Sārvabhaumah ' means ' universal ' These rules about (the maximum recoverable) being double and the like (of the principal) hold good only when there is a single transaction. But if a fresh transaction be made at a different time (from the original date) or with a different person (from the original debtor) or by deductions or additions to the debt already due, then the (maximum recoverable) may be more than the highest interest (allowed by the s'āstra at one time)² And so also Manu (VIII. 151) says :

Interest in money-lending business does not go beyond double, when

1. This verse and the following passage of the Mayūkha are quoted in 24 Bom. 305 at p. 308.

2. The sages are not agreed as to the rate of interest on various articles and so Nārada observes that there are local usages But all are agreed as to gold and silver or money that the interest recoverable at one time in a lump cannot exceed the principal. This is called the rule of *dāmdupat*. The principal text is that of Manu (VIII. 151) which is similar to Gautama XII. 28. Nilakaṇṭha very laconically puts several propositions about this rule. The principal rules about *dāmdupat* laid down by the Mit and the Mayūkha are four. They are (I) if money is lent only once to a man and interest is recovered only once in a lump then the maximum amount recoverable (together with interest) at one time cannot be more than double the sum lent, whatever the rate of interest may be and whatever the length of time may be, (II) if interest is received every month or every year and not in a lump at one time, then the total interest received may be so much that the creditor may have recovered more than double the sum lent, (III) if after the interest has accumulated for some time, there is a fresh agreement (*prayogāntara*) with the same debtor whereby the sum lent together with interest due is taken as the principal and fresh interest is agreed to be paid on the sum so arrived at, then the total recoverable after this second agreement may exceed more than double the sum originally lent (this is *kālāntareṇa prayogāntare* of the Mayūkha), (IV) if after the sum due to the creditor has become double of the sum lent, the creditor accepts another man as the debtor (who takes the liability upon himself), then the creditor may recover from the substituted debtor after the lapse of years a sum which may be more than double the sum originally lent by the creditor (this is '*puruṣāntareṇa prayogāntare*' of the Mayūkha). It is not necessary in cases falling under the third rule that the whole sum due (principal and interest) should be capitalized and again put to interest, it may be that the creditor makes a deduction (*reka*) from the sum due by way of concession or he may make an addition (*seka*) by a further cash payment and then put the whole to interest (this is '*tatrava rekasekādinū vā prayogāntare*' of the Mayūkha) Vide the Mit on Yāj II. 39 There are numerous cases explaining the limits of the rule of *dāmdupat*. Vide 1 Bom 73, 3 Bom 181, 20 Bom. 721 (F. B), 1 Bom. L. R. 551 (at p. 555 three propositions are summarised), 85 Bom. 199, 21 Bom L. R. 419 and notes on Kāt. vv 510--512. Under the Deccan Agriculturists' relief Act (XVII of 1879) the benefit of the rule of *dāmdupat* is given even to non-Hindu debtors, if they, are agriculturists.

* P. 171 (text).

it is but only once calculated.¹

Vijñānes'vara and others who are conversant with traditions say that in one transaction of money-lending if interest is received at various times, more than the highest interest (allowed by the sāstra at one time) may be recovered (in the aggregate)

Now the rules about pledge.

Bṛhaspati (p 322 v 17) says

Ādha is known as a pledge and is declared to be divisible into four varieties viz movable, immovable, for custody (only) and for use.²

Nārada (p 72 v 124) says

An *ādha* (pledge) is that which is kept with (a creditor) with power (to him over it) it is known to be of two kinds viz one to be redeemed at or within a fixed time (the other) to be retained till the debt is paid off.³

Hārta says

A pledge must be preserved in the same state in which it was deposited (with the creditor) otherwise the (pawnor) loses his interest and if there be damage to or loss of the pledge, the principal is lost

* Vyatikramah means loss of the pledge *Ājñavalkya* (II 69) says

If a pledge that is to be kept in custody only were used (by the creditor) he shall receive no interest, so also if a pledge that is to be used be damaged.

Hāpito means reduced to a state in which it is unfit for use

Kātyāyana says

(The creditor), who would make the pledge work against the latter's will and without the consent (of the pledgor) shall be made to pay (the price of) the fruits of labour (to the pledgor) or he would not get his interest.⁴

1. There is another reading *anvāhṛtā* (when recovered at one time and not by dribble every day or month) This verse of Manu is quoted in *Dopless v. James* 20 Dom. Cl. at p. 615 and it is held that arrears of interest recoverable at any one time are limited by the principal remaining due at that time. The words of the *Mayūṭha śaṭpragaya* &c. constitute the second rule mentioned above.

2. *Gopya* means to be kept in ones custody without being used or enjoyed. The fourfold division is overlapping and not logical. The pledge of a movable may be *gopya* or *bhogya* as well. Nārada's division given in the following verse is much better.

3. Nārada divides each of these into *gopya* and *bhogya* and these two again may be subdivided into immovable and movable.

4. This verse refers to slaves pledged by way of *gopyādhā*. Compare Manu VIII 114 and 120, Hanf (text p. 172 and tr. p. 227) and 24. II. 12 (first half).
p. 172 (text)

' Kārma kārayet ' (in Kāt.) means ' he shall employ ' ; ' karma-phalam ' means ' the rent or wages '. Yājñavalkya (II 59) says :

A pledge damaged or destroyed, except by the act of God or king, must be restored (by the pawnee)¹.

' Naṣṭah ' means ' has undergone deterioration '. Such a pledge must be restored after bringing it to its former condition. Brhaspati says .

When a pledge has become worthless by being used, there is loss of principal (to the pawnee).

Vyāsa declares in the case of a pledge being destroyed that its price must be paid :

If through the fault of the receiver (i. e. pawnee) a pledge of gold and the like be lost, the creditor, on recovering the principal together with interest, should pay the price (of the article pledged).

Nārada (p. 73 v. 126) says :

If (the pledge) be destroyed except by the act of god or king, there is loss of the principal (to the creditor).

Manu (VIII. 144) says :

He (the creditor) should satisfy the pawnor by paying the price; otherwise he would be a thief of the pawn.²

Brhaspati (p. 323 v. 21) says .

If a pledge be destroyed by the act of God or king, the debtor should deliver another pledge or he should pay the loan with interest

* Vyāsa says .

If the pledge be destroyed by the act of God or the king no blame attaches in any case to the creditor (or pledgee).

Kātyāyana says

If the thing pledged were to fall (deteriorate) or were to be destroyed without any fault of the creditor (the pledgee) the debtor should be made to give another pledge (of equal value) and he would not be free from the debt.

Yājñavalkya (II. 60) also says

A pledge becomes complete (valid) by acceptance (or possession) of the thing pledged,³ if a pledge becomes worthless, even though proper

1 Compare sec. 152 of the Indian Contract Act about loss, destruction or deterioration.

2. This is the same as Nārada p. 73 v. 127. According to Kullūka this refers to a case where the pledge is deteriorated by use, then the pledgee must give as much money as will be required to restore the pledge to its former state. According to Asahāya the pawnee must satisfy the pawnor by returning to him the profit made by using the pledge.

3 Possession is necessary in the case of a pledge (whether ' gopya ' or ' bhogya ') to give it validity against subsequent dealings with the thing pledged, the rule being that in the case of a pledge, gift or sale a prior transaction prevails over a later one (provided the

* P. 178 (text),

care be taken, another pledge must be kept (with the pawnee) or the creditor (pawnee) must receive his money

Nārada (p 77 v 189) says

An ' *ādhi* ' is declared to be of two kinds, movable and immovable both are complete (or valid) if there is actual possession (or enjoyment) and not otherwise (i. e. if there be no possession but mere witnesses or document).

Vasugtha also says

When² there are several documents of pledge executed at the same time, the pledge to him is stronger who gets possession first

The same author says

If two (creditors) should come on the same day with the desire to take possession, in such a case the pledge must be divided and enjoyed equally by them this is the settled rule

*Kātyāyana says

If (a debtor) were to make a pledge of the same thing to two persons, what would happen to him is that the prior transaction of the two should be accepted (as enforceable or valid) and the person (debtor) who made the two pledges would be liable to the fine prescribed for a thief³

Yājñavalkya (II 68) says

A pledge is lost (i. e. forfeited to creditor) if it is not redeemed before the debt has become double (with interest) A pledge with a fixed date (for redemption) is lost on the expiry of the time (fixed) but a pledge the fruits (or income) of which are to be enjoyed (by the pawnee) is not lost (to the pawnor)

Bṛhaspati (p 324 v 37) says

When the money lent (lit gold) has become double (with interest) or when the period fixed has expired in the case of a pledge (delivered) for a fixed period the creditor becomes the owner of the thing pledged after having waited for a fortnight⁴

prior one is complete) In the case of *gopyādhi*, the *dhya* consists in the custody of the thing though there may be no actual use. The verse of Nārada that follows is quoted in 2. Flow 229 at p. 308.

1 Compare *Vijñādharmasūtra* v 181 which says that possession is the determining factor in a case of dispute between two pawnees.

2. For the words *tam prāṇi yad iha veti* some books read *hi prāṇi yad iha veti* which is a better reading and means what should be the decision or what should be the first (i. e. acceptable) transaction. Vide *Vijñādharmasūtra* (v 181 183) which prescribes punishment for such a debtor in the case of mortgages of land.

3 This verse is ascribed to Vyāsa by several writers. It prescribes two points of time when the pawnee becomes the owner viz. when the principal has become double with interest and when the time stipulated has passed. But it allows a period of grace viz. a fortnight before the pledge becomes liable to be forfeited to the creditor

P 171 (text)

Vyāsa says ;

A pledge for custody only may, when the principal has become double (with interest) and in the case of a pledge for a fixed period when the time fixed has expired, be appropriated to his use (by the creditor) after informing the family of the debtor.¹

Brhaspati (p 325 v. 29) says .

When the money (lent) has been doubled (with interest) and the debtor is either dead or not heard of (for a long time) (the creditor) may catch hold of the debtor's chattel (pledged) and may sell it before witnesses.

Yājñavalkya (II. 61) says

In the case of (a debt) contracted on the pledge of *caritra* (the king) should cause the debtor to pay the loan together with interest and he should cause to be paid double (the amount) when money has been lent with an undertaking (to the effect that double the money only will be paid)²

*When (a borrower) from his confidence in the creditor deposits with him for (securing) a small amount a very valuable chattel or when (a lender) from his confidence in the debtor keeps with himself (as a security) for considerable money a pledge of extremely small value, it is said to be a *caritra* pledge Or *caritra* may mean the merit derived from ablutions in the Ganges and the like and *caritra-bandhaka* means a transaction where such merit is pledged Both these kinds of *caritra* pledges are not forfeited to the creditor, even though the sum lent has become double (with interest) 1 e. it is the money that has to be paid though it has become double and there is no forfeiture of the pledge. A pledge that is made with *satyankāra* is not forfeited even though the loan has become double (with interest) The same author (Yājñavalkya II. 62-63) says

The pledge shall be returned to the (debtor) when he comes (to, redeem it) ; otherwise he (the creditor) would be (deemed) a thief If the lender is not present (1. e is dead or gone abroad) the debtor may get back his pledge after keeping the money (due to the creditor)

1 This is ascribed to Brhaspati by Aparārka

2. This verse states exceptions to the rule contained in Yāj II. 58 The Mayūkha follows the Mit in giving two meanings of 'caritra-bandhaka'. The Mit gives two meanings of 'satyankārakṛtam' When at the time of making the pledge the debtor expressly stipulates that there would be no forfeiture of the pledge but that he would pay only double the amount lent then there is no forfeiture This is the first meaning and the Mayūkha seems to have accepted this The other meaning is not restricted to pledges alone If a man makes a contract of sale or purchase he may give a chattel like a ring as an earnest (*satyāṅkāra*) If the sale goes off through the default of the man who gave the earnest, then he forfeits the earnest, but if the sale goes off through the default of the other party to the contract then the party guilty of breach had to pay double the price of the earnest to the man who delivered the earnest. Vide notes to V. M. p. 325,

* P. 176 (text.),

with some other person in the family (of the creditor) or its price at the time being appraised (by arbitrators) it should remain with the creditor but interest shall cease

The meaning is When the creditor is not present the pledge should be taken back after paying the debt with interest into the hands of some one else in the creditor's family, but if he (debtor) desires to pay the debt by selling the pledge its price at that time should be ascertained and the pledge may be kept (with the creditor) but without interest (from that date) Bṛhaspati (p. 324 v 23) says

When a field or other property has been enjoyed (by the creditor) and from that property large income has accrued the debtor shall recover his pledge if the principal and interest has been covered thereby (i e by the income received)¹

Yājñavalkya (II. 64) says

When a debt has become double (by interest) and then a pledge is made (to secure it) then the pledge shall be returned after double the principal has been recovered from the profits thereof²

Now (begins the discourse on) sureties

Yāj (II 63) declares that a surety is of three kinds.³

Suretyship is ordained for appearance for assurance (or trust) and for payment.

* Pratyayaḥ (in Yāj) means the inspiring of confidence by saying this man is honest But Bṛhaspati (p. 327 v 40) mentions four kinds (of sureties)

One says I shall produce the man the other (second) says ' he is a trustworthy man , (a third one) says I shall pay the money (lent

1 This verse applies to *dhogyādhi* The agreement in a *dhogyādhi* may be of two kinds, viz. that the income derived from the enjoyment of the pledge should be taken in lieu of interest or that a portion of the income may be taken in lieu of interest and the residue of the income be applied towards reduction of the principal In this latter case the creditor will have to keep an account. Vide *Mit.* on Yāj II 61 for these two agreements.

2. Vide notes to V 31, pp. 317-318 for detailed explanation According to the *Mit.* and Aparāṅka a pledge the income of which is to be taken in lieu of interest and in part reduction of principal is called *dhogyādhi* This verse and Yāj II 64 apply to different matters the latter applies where the pledge is for use only

3. This verse of Yāj is quoted in 41 *Māh. 1073* Vide notes to *Kāṭ.* v 231 for historical treatment.

to another); (the fourth says) ' I shall deliver ' (debtor's assets to the creditor)¹

' Aṭpayisyāmi ' (in Brhaspati) means ' I shall make him pay '.

Kātyāyana says :

Three fortnights at the most should be allowed for finding out the absconding (debtor) If during that time he (the surety) produces him (the debtor) the surety would be absolved from liability.

' Three fortnights ' is merely indicative. The meaning is : as much time as is required (for producing the debtor), so much should be allowed.

Kātyāyana says

If the surety for appearance cannot produce (the debtor) at the time and place (agreed upon), he should carry out what he has bound himself for, except where (debtor does not appear) through act of God or the king.

' Nibandham-āvaheṭ ' means ' he should pay the money due to the creditor '. Brhaspati (p. 327 v. 41) says :

The first two sureties (for appearance and honesty) must be made to pay the sum that may be declared to be due at the time (when the debtor should have paid) in case of failure ; but the latter two and in their absence their sons also (are liable to pay)²

Kātyāyana says :

The debt (of the grandfather) arising from suretyship should in no case be paid by the grandson ; even the son need pay only the principal (of the suretyship debt) of his father in all cases.

Vāyasa also says :

A *grandson must pay the debt of his grandfather (except suretyship debts), a son has to pay his father's debt arising from suretyship, but only the principal, but the sons of these two should not be made to pay (the debt of their great-grandfather and grand-father respectively), this is the settled rule³

1. The first three varieties of Brhaspati correspond respectively to the surety for appearance, honesty and for repayment. The fourth kind of surety undertakes to hand over the property (furniture in the house &c.) of the debtor in case the latter does not pay

2. ' The latter two '— this means ' the surety for payment ' and ' for delivery of the debtor's chattels '. The son of the surety for honesty and appearance is not liable to pay his father's suretyship debt but the sons of the other two kinds of sureties are liable to pay (but not the grandsons). In *Tukarambhat v Gangaram* 23 Bom 454 at p 459 the texts of Yāj., Br. and Kāt are examined and it is held that ancestral property in the hands of sons is liable for the suretyship debts of their father, when latter was surety for payment of money or delivery of goods, vide 28 Mad 377, 89 Cal. 843, 26 All 611

3. The text of Vyāsa applies when a man stands surety without receiving any monetary consideration. The son of the grandson need pay no debt of the great-grandfather while the son of the son need not pay the suretyship debt of his grandfather. In *Narayan v. Venkatacharya* 28 Bom 408 this is quoted There are apparently conflicting texts about the liability of descendants for their ancestor's debts. But the conflict will not exist if each

* P, 177 (text).

The grandson should pay the debt of his grandfather but only the principal, the son also should pay only the principal of the suretyship debt (of his father), this applies when the position of a surety is undertaken without receiving any monetary consideration. But where suretyship is undertaken after receiving money the son and the grandson also should pay (the suretyship debt) with interest. And so says Kātyāyana.

Where a person becomes a surety for the appearance of a man after receiving a pledge from him the son of the surety should be made to pay in the absence (of the father) the money from his paternal wealth.¹
Yājñavalkya (II. 55) says

If there be many sureties they should pay the debt (due from the principal) in accordance with their shares (i.e. equally or in proportions agreed upon) but when they have each bound themselves to the same extent (as the principal) then at the pleasure of the creditor (any one of them will have to pay the whole)

Ekacchāyā means an undertaking made by each I alone shall pay the whole (debt) when the sureties have resorted to such an undertaking any one of them would have to pay according to the creditor's choice. But when the agreement is I shall pay in certain shares then payment shall be made accordingly. This is the meaning Kātyāyana says

text is given its appropriate scope. Ancient sages made sons and grandsons liable for their father's or grandfather's debt even if no property of the father or grandfather came to their hands. But it seemed very hard that descendants should be made to pay their remote ancestor's debts with interest. Therefore when no property existed, the great grandson was not bound to pay any debt of his great-grandfather, the grandson was bound to pay only the principal (but not interest) and the son was liable to pay the principal as well as interest. But if ancestral property existed and was taken by descendants, then sons, grandsons and great-grandsons were all bound to pay the debt to the full. This last follows from Yāj. II. 51 Br (p. 228 v 48) Kātyāyana quoted above (on text p. 101) verses 556-558 of Kāt. and the Mit. on Yāj. II. 51. The former proposition is the subject of the verse of Vyāsa and of Br (p. 228 v 42) The Vīramitrodaya (p. 24) very tersely but clearly puts these two propositions पुत्रेण रिक्त्वग्रहणामप्यप्योऽस्य दक्षिणमेव देवम् । पुत्रमात्रेण रिक्त्वग्रहणे सोदकं देवम् । अग्रहणे मूकमेव । प्रपौत्रेण तु रिक्त्वग्रहणे मूकमपि न देवम् ॥ As to suretyship debts a distinction was made. If no money was received, even the grandson was not bound to pay his grandfather's suretyship debt and the son was bound to pay only the principal. This is expressed by Kāt. Some writers went so far as to say that the son was not bound to pay any suretyship debt of his father (vide Gautama XII. 88, Manu VIII. 153 Vas. XVI. 81) while others said that the son was not bound to pay when the father stood surety for appearance or honesty but that he was bound to pay when the father stood surety for payment (vide Manu VIII. 160 and Br. p. 227 v 41 cited above). In 10 Patna p. 34 it was held that if the father stood surety for honesty the son was not bound to pay that debt. Vide also 4 Patna L. J. 302

1. The Mit. on Yāj. II. 51 explains that this applies to the surety for honesty also. If a man read vinā pīṭhā dhanāt the meaning would be in the absence of the father from that wealth (viz. from the pledge). In the absence of the father means if he be dead or gone abroad

*Of sureties jointly and severally bound any one that is found may be made to pay (the whole debt) If he be gone abroad his son may be made to pay the whole; but if he be dead then his son shall pay according to his father's share (i e proportionate liability)

'Pitrāmśāt' means ' in accordance with his father's share (of the debt guaranteed) ' Yājñavalkya (II 56) also says :

When a surety has been made to pay publicly (the whole) debt to the creditor, the debtor should be made to return double the amount to him (or his son).¹

Brhaspati (p. 328 v. 44) says .

He, who being made a surety and being harassed (by the creditor) pays the suretyship debt, is entitled to receive (from the original debtor) twice the amount (paid to the creditor) after the lapse of three fortnights.²

Now about the method to be followed by the creditor in recovering debts

Brhaspati (p 329 v. 54) says .

A debtor who acknowledges a debt to be due should be made to pay by the expedients of coaxing and the rest, by appeal to *dharma*, by artifice, by force (or compulsion) and by barring his house.

'Pratipannam' (in Brhaspati) means 'admitted by the debtor', 'upakramaih' means 'by expedients'. The same author (Brhaspati p. 330 vv. 55-58) explains these (terms, *dharma* etc.)

That is declared to be *dharma* (expedient) where a debtor is made to repay by the advice (or messages) of friends and good kinsmen, by coaxing words, by persistent following, or by importunate entreaties (or creditor's starvation). When the creditor brings from the debtor some object, borrowed on some pretext, or where the creditor retains an *anvāhita* deposit and thus the debtor is made to pay, that is said to be (the expedient of) artifice³ That is declared to be compulsion where a

1. This applies only where the surety or his son is pressed by the creditor to pay and so pays. If the surety pays out of greed to secure double of what he pays, he would not get double.

2. If the debtor pays before three fortnights expire, the surety or his son would get only what he paid.

3 'Anvāhita' is what a debtor hands over to a creditor for being delivered to a third person. The creditor retains such a deposit and thereby compels payment. 'Borrowed on some pretext'— i e. borrowing an ornament &c. for marriage or other festive occasion

* P. 178 (text). ‡ P. 179 (text).

debtor is made to pay by being bound brought to the house of the creditor and by such means as beating and the like. Where by restraining his sons or wife or cattle or by sitting down at his door a debtor is made to pay the money (lent) that is said to be *ācarita*.¹

'Anugamah means following, *prāyaḥ* means entreaty', 'anvāḥitam means an ornament or the like given to (the creditor) for being handed over to a third person. As regards these expedients of *dharma* and the like *Kātyāyana* speaks of certain restrictions.

(A creditor) should make a king a master or a brāhmaṇa debtor pay (a debt) by the mode of coaxing and he should make a co-heir or friend pay (a debt) by artifice only. Traders husbandmen and artisans should be made to pay according to the usage of the country. He should make wicked debtors pay by the expedient of harassment.² This is the view of Bhṛgu.

The same author (*Kātyāyana*) says

The debtor should be kept openly in restraint before an assembly of people according to the dictates of local custom whatever he gives may be taken (by the creditor).

The same author (*Kātyāyana*) forbids the (continuance of the) confinement of a debtor when the confined debtor has an inclination to evacuate.

Where a man held confined (for debt) has an inclination to void urine or faeces, he should be followed from behind or he should furnish (another person) as a surety (or hostage).³

* *Nibandham* means a son or the like who would be a substitute for him (the debtor). The same author (*Kātyāyana*) says that a confined debtor should be let off for meals after taking a surety for appearance.

That (debtor) if he has furnished a surety should everyday be set free at the time of taking meals and at night (while) the surety remains confined. He who cannot secure or tender a surety for appearance should be confined in jail or should be placed in the presence of guards. A respectable trustworthy and pure man should not be confined in a jail, he should be released without a surety or should be bound over on his oath.

1. *Ācarita* seems to be meant as a synonym for *grhasamrodhana*. *Manu* VIII 42 speaks of *ācarita* as one of the five expedients of recovering a debt. In view of the fact that *ācarita* is separately defined it is better to take *prāyaḥ* as meaning entreaty.

2. *Sāntva* is the same as *sāntva* by harassment — this includes the modes of bail (compulsion) and *ācarita*. Though *Manu* speaks of the five expedients, there are no verses in *Manu* corresponding to the restrictions mentioned by *Kāṭ*. The 2nd. verse is quoted in *Baghwanthaji v. Bank of Bombay* 31 Bom. 72 at p. 78. These means could be employed only if the debtor admitted the debt, but if he repudiated the debt, then the only remedy was an action at law (*vyavahāra*).

3. If we read *nibandham* &c. it would mean he should be let out with fetters

'Na vās'rayet' means 'would not tender'; 'cāruke' means 'in jail'; 'rakṣinah' means 'he should be kept with guards who are told (about his being confined for debt)'; 'prāṇayikah' means 'trustworthy'. Brhaspati (p. 331 v. 60) says :

When the time fixed (for payment) has elapsed and interest has ceased (owing to the debt having risen to double the principal) the creditor should recover the debt or the debtor should execute a bond by the mode of compound interest¹

'Pṛṇāvadhau' means 'when the debt has risen to double or the like'. Hence it is reasonable that interest ceases (in such a case). The creditor should recover (i. e. take) the debt. 'ekrayaddh' means 'calculation of interest (on the aggregate) after adding interest to the principal'. Nārada (p. 71 v. 131) says

* If a debtor is unable to pay owing to adverse times, he should be made to pay the debt gradually (by instalments) according to his means and according as he happens to acquire (money or property).

Manu (VIII. 177) says .

Even by (doing) work (suited to his caste) should the debtor make himself equal to his creditor, if (the debtor) be of the same caste (as the creditor) or of a lower one. But a debtor of a higher caste (than the creditor) may pay (the debt) gradually²

As regards what Yājñavalkya (II. 43) says

(The creditor) may make a debtor of a lower caste work personally for liquidating the debt, if he be indigent, an indigent brāhmana however should be made to pay gradually according as he happens to have means (or money)

there the word brāhmana stands for any one of a superior class The same author (Yāj II 40) says .

A creditor recovering an admitted debt (by the expedients of dharma &c.) will not be liable to be blamed by the king, a debtor from whom (an admitted debt) is being recovered (by the above expedients) should be fined, if he goes (i. e. complains) to the king and should be made to pay the debt.

Brhaspati (p 331 vv. 62-63) says .

1. This refers to capitalisation of interest and an agreement to pay interest on interest (and principal) This verse together with the comment of V. M. is quoted in *Suklal v Bapu* 24 Bom 305 at p 308 for the proposition that capitalisation of interest was allowed in Hindu Law.

2 In the first half we must understand that the debtor belongs to the ksatriya, vaiśya or s'ūdra caste and the creditor belongs to the same caste as the debtor or to a higher one. As regards a brāhmana debtor the rule is contained in the last pāda 'Make himself equal &c.' i. e. he should be free from being indebted to him Compare a similar rule about fines in Manu IX. 229,

* P. 181 (text).

This is the rule concerning him who admits (his liability) but (a debtor) denying (his liability) shall he made to pay on (the debt) being proved in a (judicial) assembly by a writing or by means of witnesses. (A debtor) claiming judicial investigation in a doubtful case should never be put under confinement (by the creditor), but he who puts under restraint one who should not be restrained becomes liable to be fined according to law

Āsedhaḥ means restraint by the king's order The same author (Bṛhaspati p. 331 v. 64) says

Where a debtor says what may be found to be justly due that I, shall pay such a debtor is called *kṛyadvādt* (one claiming judicial proof)

*Kātyāyana says

A creditor who harasses a debtor claiming judicial investigation would lose his money and becomes liable to a fine equal to the debt.

Bṛhaspati says

He who in a doubtful (or contested) case proceeds with force (to recover his debt by *dharma bala* &c) without complaining to the king should be punished by the king and that money (the debt) he cannot recover¹

Yama says

That debtor who though well off, does not return (a loan) on account of his wicked nature should be made by the king to pay (the debt to the creditor) after recovering (as a fine) from him (debtor) double (the amount of the debt)

Yājñavalkya (II 42) says

The debtor should be made by the king to pay (to the king) ten per cent of the claim established and the creditor should be made to pay five per cent when he succeeded in his claim²

Dasakam means with ten in addition i. e. the tenth and twentieth share (respectively) The sense is that these shares belonged to the king and the remaining belonged to the creditor The levy of a tenth share (for the king as his fee) refers to a poor (debtor) But Nārada (p. 74 v. 182) states a special rule about a rich (debtor)

1. Prasmhya may also be connected with *visēyaḥ* and then the meaning would be he should be punished severely Bṛ p. 331 v. 65 says that when there is a difference of opinion between the two parties regarding the nature of the loan, about the number (i. e. about the sum advanced) or about the rate of interest stipulated, or whether the amount claimed be due or not that is termed a doubtful case.

2. Ten per cent and five per cent recovered from the debtor and creditor respectively were in modern language the court fee but it was, it appears charged after the case was decided and not at the very institution of the suit, as now These recoveries were made only when there was no dispute as to the debt but where the debt itself was repudiated Yāj II. 42 applied.
P. 182 (text)

A debtor, who being well off, does not pay (a debt) through wickedness should be compelled by the king to pay it after taking twenty percent (from the debtor).

*The meaning is ' twenty in a hundred ' ¹

When several creditors present themselves at the same time (for payment) Yājñavalkya (II 41) states the order (of payment) :

A debtor shall be made to pay his creditors in the order in which (the loans) were taken, but after (first) discharging (the debt due) to a brāhmana and afterwards that due to the king.²

Kātyāyana, as quoted in the Vivādaratnākara, says

When, however, there are several debts due at the same time that which was first contracted should be paid first, a debt due to a king (should be paid) after one due to a learned brāhmana. Where (several debts) are contracted in writing on the same day, (the king) should treat all as equal so far as the security, its protection and enjoyment are concerned ³ In other cases (i e where debts are not of the same date) they should be paid in order (of dates) Where a creditor establishes that a particular article for sale was manufactured (by the debtor) with the money (or materials) supplied by him, the money (got by sale of the article) should be given by the debtor to that creditor only and not otherwise

Yājñavalkya (II. 93) says

The debtor should write on the back of the document the money paid by him from time to time (by instalments) or the creditor shall pass a receipt marked with his own hand.

Nārada (p 70 v 116) says

When the debt is discharged (the creditor) should return the document ; in the absence of the document (creditor) should give a receipt. In this way the creditor and debtor would be free from their mutual obligations.

¶ ' Pratiśravah ' means ' a document of release declaring that a debt

1. Par M. and Vir explain differently, saying that it means ' a twentieth part ' of the claim Compare Manu VIII 139, Viṣṇu VI 20-21

2. If the creditors were of the same caste and all approached the king at the same time, debts were paid in the order in which they were contracted (i e the earlier prevailed over the later), but if the creditors were of different castes, the brāhmana creditor was paid first though his debt was later in date than that of a ksatriya creditor Vide sec 48 of the Transfer of Property Act (for the the proposition that the first in time prevails) and sec 56 of the Bombay Land Revenue Code (which makes state revenue a paramount charge on the land).

3. This verse states a rule of rateable distribution among several debts if the debtor is not able to pay all fully The same rule applies to a pledge, to the expenses of preserving it and to the interest or enjoyment of it.

* P. 183 (text). ¶ P. 184 (text).

was returned ¹ Kātyāyana states the evil results happening to a debtor in case he does not repay a debt

He who, having taken a debt or the like does not pay it back to the owner (creditor) is born in (the latter's) house as a slave a servant a wife or a beast ²

Uddhārah³ means a debt by the word ādi (in uddhārādikam) a friendly loan and deposit are included. Dāśah means a born slave, bhṛtyah⁴ is one who is secured for wages. Nārada (p 44 vv 7-8) says

The debt or promised gift which a debtor does not pay even when demanded goes on multiplying till it reaches to a thousand millions. On that amount being reached the debtor enveloped in (the consequences of) that act shall be born in each successive birth a horse a donkey a bull or a slave.

'Pratigraham means what is promised to be given Vyāsa also says ⁵

If an ascetic or an *agnihotra* (one who keeps sacrificial fires) were to die indebted all (the merit of) his austerities and *agnihotra* will belong to the creditor

Bṛhaspati (p 328 v 49) says

The father's debt when proved must be repaid by the sons as if it were their own (i.e. with interest) The debt of the grandfather should be paid equal to the principal (i.e. without interest) and the son of the grandson need not pay at all.⁶

1 The V R. and Aparārka explain pratirava as meaning a verbal acknowledgment in public (or before witnesses) of the repayment of a debt This is, according to Amara, the proper meaning. The meaning assigned in the text is far fetched.

2. Compare Nārada p. 44 vv 7-8 quoted later on.

3. This is Nārada p. 44 v 3

4. Vide text p 177 Vyāsa's verse. This verse is quoted in *Narayanacharya v Narso* 1 Bom. 203 at p. 206. Bṛhaspati as said there is referring to a case where no property comes to the grandson. The Mit. on Yāj. II. 51 distinctly says that if the great-grandson and the like take the estate of the deceased, they have to pay the debt of the great-grandfather. Modern decisions have followed this view of the Mit. In 12 All. 26 (F R.) and 4 Pains 478 a grandson taking assets was held liable to pay his grandfather's debt with interest, while L.R. 53 I. A. p. 204 (=48 All. 518) decides that the great-grandson who has taken assets is liable to pay the debt of the great-grandfather with interest just as a son is liable. In 48 All. 518 at p. 520 Yāj. II. 50 and Bṛ. are quoted. In *Narayanacharya v Krishnanarao* 2 Bom. H. C. R. p. 64 it was held (probably following Bṛhaspati) that the grandson was liable to pay the debt of his grandfather without interest independently of the question whether he took assets. In order to remove the great hardship on heirs (taking no assets) caused by this decision Bombay Act VII of 1886 (The Hindu Heirs Relief Act) was passed whereby it is provided that a son or grandson is not liable to be sued for the debts of his deceased ancestor merely by reason of his being a son or grandson and that the son or grandson or other heir shall be liable only to the extent of the assets that came to his hands. In 12 All. 26 (at p. 27)

Yāj (II. 50) says :

When the father has gone abroad or is dead or is overwhelmed by difficulties, his^{*} debt if proved by witnesses when it is disputed (by the sons or grandsons) must be paid by sons and grandsons ¹

Nārada (p. 46 v. 14) says that the son and the rest were bound to pay the debt (of the father &c) only when twenty years old :

When the father had gone abroad and also in the case of the uncle or eldest brother (going abroad) the son (or the nephew &c) was not bound to pay the debt before the twentieth year.²

Kātyāyana says :

A debt incurred by the father, if he is afflicted with disease or has left his country for another must be paid by the sons after the twentieth year even when the father is living ³

The word ' prosita ' (gone abroad) is indicative also of ' one dead '. Hence Visnu (Dh. S VI 27) says ' when the borrower is dead or has become an ascetic (*sannyāsin*) or has lived abroad for twenty years, the debt must be paid by his sons and grandsons '. Nārada (p 41 v 2) says

When the father is dead, the sons should pay the (father's) debt according to their shares if they be divided ; but if undivided then he (out of the sons) should pay who bears that responsibility (as a manager of the family) ⁴

two verses of Kātyāyana about the grandson's liability to pay with interest and also without interest are referred to. In 4 Patna 478 (at p 482) the judges express their inability to understand what Brhaspati means when he says that the grandson should pay grandfather's debt without interest and follow Yāj. and Visnu and refuse to follow Brhaspati. They had no idea of the particular circumstances under which alone, as shown above, Brhaspati's text was to be applied.

1. This verse makes no distinction between sons and grandsons as to the payment of debts (while Br. makes that distinction) and applies where assets are taken by the grandsons. The Mit explains ' vyasanābhīpluta ' as ' afflicted with an incurable disease ', while Aparārka explains as ' addicted to drinking or other vices ' If there were sons and grandsons the Mit says that the sons were the first to pay This verse is quoted in 42 Mad. 711 (F. B.) at p. 730.

2. This does not apply to a debt incurred by the father and others for a family necessity. Such a debt must be paid at once This verse states the liability of the son and others when the father, uncle or brother was alive though gone abroad and the debt was not for family necessity Nilakantha refers ' twenty years ' to the age of the son &c, while other authors like the Vir refer them to the lapse of time after the father went abroad. Visnu VI. 27 quoted in the text later on supports this latter interpretation

3 This verse is referred to in I L. R. 41 Mad 186 at p 149 and 42 Mad. 711 (F. B.) at p 730.

4. This verse is quoted in *Narayanacharya v Narso* 1 Bom. 262 at p. 266 and in 19 All. 26 (F. B.) at p. 28. Vide *Udaram v Ranu* P J. for 1875 p 26 at pp. 28-29 for texts.

* P. 185 (text).

Kātyāyana says

While the father's debt remains (unpaid) the son shall not take the father's wealth which should be given to the creditor even without (paternal) wealth the son is made to pay the father's debt.

The word *dravyam* (in Kāt.) is to be connected with *ṛte* the meaning being without or in the absence of wealth Bṛhaspati (p. 828 v 48) says

The father's debt must be paid first of all and after that a man's own debt but a debt contracted by a grandfather must always be paid even before these two.¹

*Yājñavalkya (II 47) says

The son shall not pay his father's debt contracted for wines, lust and gambling or due on account of unpaid (portions of) fines or tolls or on account of an idle promise

Bṛhaspati (p. 829 v 51) says

(The king) should not make the son pay a debt (of his father) incurred for wines or (losses) in gambling with dice for idle gifts or promises made through lust or wrath, or for suretyship or for the balance of a fine or toll.

1. This verse is in apparent conflict with another verse of Bp. quoted above (vide p. 214 n 4). This verse must be taken as referring to a case where assets were taken by the grandson. The number of cases in which the son's or grandson's liability to pay the father's or grandfather's debts has been recognised in modern decisions is innumerable. It is impossible to refer to them. The several propositions deducible from the decided cases are summarised in *Joharwal v Ekwal* 3 Bom. L. R. 523 and very recently by the Privy Council in *Brij Narain v Mangla Prasad* L. R. 51 I. A. 123 (= 40 All. 35). The propositions laid down by the P. C. are (1) The manager of a joint undivided estate cannot alienate or burden it except for purposes of necessity (2) If the manager be the father and the other members be his sons, he may so long as it is not for an immoral purpose, lay the estate open to be taken in execution upon a decree for the payment of his personal debt (3) If the father purports to burden the estate by a mortgage it would not bind the estate unless it is made for discharging an antecedent debt (4) antecedent means antecedent in fact as well as in time i. e. it must be truly independent of and not part of the transaction impeached by the son (5) this result is not affected by the question whether the father is alive or dead. It will be seen that in propositions 2 and 3 the Privy Council makes a distinction between a pure money debt of the father and a debt of the father secured by a mortgage. The ancient Hindu Law books afford no warrant for this distinction. Besides the P. C. in *Saraj Dast Koor v Sheo Prasad* G. I. A. 89 at p. 106 (= 5 Cal. 148 171) for the first time used the words antecedent debt for which there is nothing corresponding in the Sanskrit texts and round which elaborate arguments have centred in numerous cases. According to the P. C. (proposition 3) the son's pious duty to pay his father's debt is as absolute during the father's lifetime as after his death. This goes far beyond the spirit of the ancient Smṛti texts which made the son liable during the father's lifetime only if the father had gone abroad for many years or was afflicted with incurable disease or was extremely old. Vide Yāj. II 50 Nārada and Kātyāyana quoted above.

Us'anas says:

The son need not pay the fine or the balance of a fine, the toll or balance of a toll or (any debt) which is not *vyāvahārika*.¹

Yājñavalkya (II. 51) mentions the order of those who are responsible for the payment of debts.

He who receives the estate (of the deceased) should be made to pay his debt and so also one who takes the wife (of the deceased); failing them, the son (should be made to pay) when no paternal wealth has gone to another person ; those who take the wealth of a sonless man (should be made to pay his debts).

1. These verses of Us'anas, Bṛhaspati and Yāj. state exceptions to the rule (Yāj. II 50) that sons (and grandsons) had to pay their father's debts. A debt due to lust is defined by Kātyāyana (v. 564) as one promised orally or in writing to a woman who is another's wife or who is not married to the father. A debt incurred through wrath is defined by Kātyāyana (verse 565) as one promised to a man to whom the father caused physical injury or whose wealth the father destroyed by way of pacifying him. 'An idle gift' is one promised to bards, wrestlers, jesters and the like. In numerous decisions these three verses about debts that the son was not bound to pay have been quoted and explained. The greatest difficulty is caused by the words 'na vyāvahārikam' in Us'anas. They have been variously interpreted by Sanskrit commentators. Aparārka explains as 'na nyāyīyam' (not righteous or proper), Sm. C. as 'saurikam' (incurred for drinking) and Vir. does the same. The Bālabhāṭṭi explains as 'na kuṭumbopayogi' (not for the benefit of the family) while Vivādācintāmaṇi explains it as 'vyāvahāra-bahiskṛta' (what is beyond the ordinary conduct of a person). This divergence is reflected in the modern decisions also. In *Durbar Khachar v. Khachar Harsur* 32 Bom. 348 'na vyāvahārikam' was explained as a debt which the father ought not as a decent and respectable man to have incurred and it was said that the son was not liable for debts attributable to his father's failings, follies and caprices. This was doubted in 40 Bom. 126 and 43 Bom. 612 and disapproved of in 39 Cal. 862 (where it was rendered as 'not lawful, usual or customary'), 37 Mad. 458 (explained as 'not supportable as valid by legal arguments and on which no right could be established in the creditor's favour in a court of justice'), 38 All. 472, 4 Lahore 98 (which at p. 27 follows the explanation in 37 Mad. 458). In the latest Bombay cases *Bai Mani v. Usafali* 33 Bom. L. R. 180 (at p. 193) and *Bai v. Maneklal* 34 Bom. L. R. 55 at pp 67—68 (=56 Bom. 36) the various meanings of 'na vyāvahārikam' and the conflict of judicial decisions are set out. In the latter case (at p 69) the wide interpretation contained in 32 Bom. 348 has not been accepted. In this Bombay case it was held that the trade debts incurred by a Hindu father for the purposes of a trade started by himself are binding on his sons. But this proposition seems to be wrong in view of the Privy Council ruling in the *Benares Bank Ltd. v. Har* 34 Bom. L. R. 1072 (P. O), where it was held that a business started by the father as manager cannot, if new, be regarded as ancestral so as to render the minor member's interest in the joint family property liable for debts contracted in the course of the business. Another difficulty is caused by cases where the father incurs liability for misappropriating money as a guardian or trustee or is guilty of a criminal act. Vide 31 Mad 161 and 472 (distinguishing 27 Mad 71), 48 All. 9, 51 All. 386 (at p. 391 'na vyāvahārikam' referred to), 43 Bom. 612. In *Bai Mani v. Usafali* 33 Bom. L. R. 180 it was held that a Hindu son is not liable to pay his father's debt where the liability arises directly from a criminal act (e. g. where the father being appointed guardian of a minor misappropriates minor's money).

That man is termed *rikthagrahah* (in Yaj.) who takes the wealth of the (deceased) father of a person, either justly because the son though living is affected by defects such as impotency and the like or unjustly when there is no defect (in the son). In the same way *yoṣidgrahah* is one who takes the wife of another (after the latter's death). The condition that no paternal wealth should have gone to another may occur in two ways, either because there is a non-existence the counter-entity of which is characterised by the quality of going to another or because there is non-existence the counter entity of which is merely the qualifying adjunct viz. estate¹. Here the meaning is that he who takes the estate has first to pay the debts (of the deceased), on failure of him the taker of the wife (has to pay the debts), on failure of him (the son when the estate has not gone to any other person (because none exists), on failure of him (the son) the grandson (has to pay) only the principal (and, no interest) on failure of him the great-grandson the wife, the daughter and the rest who are *rikthinah* (i.e. if they take the estate) should pay the debts of the deceased. If no inheritance² is received then debt is not payable by the great grandson by the wife and the rest. Heritage when taken, even though small leads to the liability to pay off debts even though

1 The name *rikthagraha* &c. is a very difficult one and various interpretations have been proposed. Vide for details notes to V. M. pp. 840-843. The meaning of the rather obscure clause in the *Mayūkhā* the condition... estate is this a son may be one whose paternal wealth has not gone to another person in either of two ways. First, the father may have left no wealth. In such a case the son inherits no property and so such a son is *ananyāḥ ritaḍṛavya* (as no property exists) secondly a father may have left property and also sons. In such a case the wealth that exists will not go to another and so the son will be *ananyāḥ ritaḍṛavya*. The rule is that he who takes the estate should pay the debts. If a man died leaving property a congenitally blind son and a nephew the nephew would have taken the estate. In such a case in spite of the rule '*putrapautrair pṛam deyam*' the nephew would have to pay the debts because he takes the estate. If there is no wealth, but a man leaves a widow and a son the man who takes his widow had to pay debts and not the son who took no estate. This text does not prescribe re-marriage. Remarriages were prohibited by *Mānū* (V. 103) but by custom or otherwise they did take place. In that case the man who took the widow (as a wife or mistress) had to pay the deceased man's debts. This was apprehended to be the law even in modern times and so sec. 4 of the Bombay Act VII of 1833 (*Hindu Heirs Relief Act*) expressly provides 'no person who has married a Hindu widow shall merely by reason of such marriage be liable for any of the debts of any prior deceased husband of such widow'. If a man left no wealth and none took his widow, then his son, though he took no wealth, had to pay his deceased father's debt. This is expressed by *putro* &c. It might be contended that *ananyāḥ ritaḍṛavya* means that wealth exists but has not gone to another. To that *Nīlakaṇṭha* replies by saying that even when merely wealth does not exist the son may yet be called *ananyāḥ ritaḍṛavya* and that this second meaning of *ananyāḥ ritaḍṛavya* is intended in the verse of Yaj. and not the first meaning.

2. This sentence and the next are referred to in *Lakṣmaṇ v. Saiyabhamalai* 2 Bóm 434 at p. 429. This proposition of the *Mayūkhā* about a small estate making the taker liable to pay heavy debts is not supported by the *Mit* or any other high authority.

comparatively very large. It is not a rule that heritage which is equal to or more than the debts alone leads to liability to pay debts. Another meaning of the last quarter of the verse is of a creditor who is sonless, the 'rik-thināh' i. e. the wife, daughter and the rest who are entitled to take his estate should recover the debts from the debtor of their husband and the like. Viṣṇu (Dh. S VI. 29) says 'the man who receives the assets of the deceased, whether he have sons or he be sonless, shall pay his debts'. Bṛhaspati (p. 329 v. 52) says .

'The taker of the wife is similarly liable (to pay the debt) in the absence of a taker of the estate'. Kātyāyana says .

(The king) should make the son pay (the debt of his father), if he be free from disease, capable of taking the estate (of his father) and is able to shoulder (the liability) ; but (he) should not make the son pay otherwise. First the taker of a man's wealth should pay his debts, after him the son should pay, when there is no son or when the son is very poor the taker of the wife (shall pay the debt)¹

Nārada (p 47 v 21) says .

But if a widow has plenty of wealth and has offspring and repairs to another (man) together with them (the wealth and offspring), that man, must pay the debt contracted by her (deceased) husband or he must abandon her together with her wealth and offspring

Kātyāyana says :

The debt contracted by liquor-sellers and the like who have no wealth and no sons should be paid by him who enjoys their wives.²

*Nārada (p 48 v. 23) says .

Among the three, viz the taker of the wealth (of the deceased), the taker of his widow and the son, he is liable for the debts (of the deceased) who takes his wealth; on failure of the taker of the widow and of the taker of the wealth, the son (is liable for the debt); on failure of the taker of the wealth and of the son, the taker of the widow (is liable for the debts)³

1, 'Capable of taking' i. e. not liable to be excluded from inheritance for causes mentioned in Manu IX 201 and Yāj 11. 140, 'able to shoulder' i. e. of age and able to pay back the debt. There is an apparent conflict between the second verse of Kāt and Yāj. 11. 51 (rikthagrāha &c) But really there is none. Kāt here provides for a special case viz if there are no assets of the deceased then the son who has much more property of his own than the taker of the wife (of the deceased) should pay the debt, when the son is not wealthy and no assets are left by the deceased, then the taker of the wife should pay.

2. Mandlik translates (p 114) 's'aundika' as drunkard but, this is wrong

3. We must take the third quarter as corresponding to Yājñavalkya's 'putroSnanyās-ritadravyaḥ'. But the words of the last quarter seem to be in conflict with the order proposed by Yāj (viz first 'rikthagrāha', then 'yoṣidgrāha' and then the son who is 'ananyās-ritadravya'). Therefore Nārada's last quarter must be taken as referring to a case where there is no son richer than the second husband or paramour of the widow of the deceased, as in Kātyāyana's text quoted above (first the taker of the assets should pay &c.),

* P. 188 (text)

The meaning of the last quarter is that in the absence of a rich son the taker of the widow must pay the debts (of the deceased) on account of the text of Yāj (II. 51) cited above. Kātyāyana says

A debt incurred for (the purposes of) the family by the slaves, the wife, the mother the pupil or the son (of the head of the family) even without his consent when he is gone abroad should be paid by him (by the head of the family) This is the view of Bhṛgu.¹

Yājñavalkya (II 46) says

A woman is not bound to pay a debt incurred by her husband or son, nor is a father (bound to pay a debt) contracted by his son nor the husband (a debt) contracted by his wife unless the debt be contracted for the purposes of the family

Kātyāyana says

That which has been promised or which was ratified after (it was contracted) must be paid ²

Nārada (p 45 v 11) says

The father should pay that debt of the son which was contracted (by the son) in serious difficulties (i. e. in danger to life)

Yājñavalkya (II 48) says

Among herdsmen vintners dancers washermen, hunters, the husband must pay the debts of his wife since their livelihood depends on the wives³

The same author (Yāj II 49) says

A *woman should pay a debt (of her husband) agreed to by her or which was contracted by her jointly with her husband or a debt which was contracted by herself alone she need not pay other debts⁴

A woman taking the estate shall pay debt (of the deceased) even when she did not agree to it. To the same effect is Kātyāyana:

A wife who was addressed by her husband when about to die ' you

1. This verse and the following one of Yāj. are quoted in *Vinayadasi v. Appasudasi* 1 Mad. H. C. R. p. 875 at p. 879 * (where it was held that, when a husband married a second wife and the first wife left him, the first wife had no implied authority to borrow money for her support) Compare Manu VIII. 106, Yāj. II 45, Nār. p. 45 v 12 and Dy p. 322 v 50

2. This verse refers to a debt not contracted for the purpose of the family but is an individual debt which another member of the family (such as the father or brother) was not bound to pay unless he promised at the time that he would pay it or unless he ratified it.

3. This is quoted in *Raghunathji v. Bank of Bombay* 81 Bom. 72 at p. 78. Compare Nārada p. 47 v 12 and Viṣṇu VI. 87 for the same rule.

4. This verse is quoted in 1 Bom. 121 at p 121. In *Narotam v. Asaks* 6 Bom 478 (where most of the texts as to a woman's liability for husband's debt are discussed) it was held that a married woman who contracts a debt jointly with her husband is liable to the extent of her stridhana only and not personally

should pay my debts ' should be made to pay (the debts of her husband).
The woman should pay the assets that came to her.¹

Nārada (p. 47 v. 20) says :

If a woman who has a son forsakes her son and goes to live with another man, her son alone should pay all her debts if she has no property.²

This verse refers to a son who has taken the assets (of his father). Nārada (p. 42 v. 3) says :

That debt which was contracted for the family by an undivided uncle, brother or mother must be discharged by all the sharers in the assets (of the family).³

In regard to the discharge of debts when the creditor or his sons and the like do not exist Nārada (p. 69 v. 112-113) declares the mode :

Whatever is to be paid to a brāhmana creditor, who is no more together with his family (i. e. neither he nor his children are alive) should be given to his kinsmen and in default of them to his *bandhus*.⁴ Where there are neither kinsmen, nor relatives nor *bandhus*, it should be paid to (other) brāhmanas; on failure of even these (other brāhmanas) he must cast it into the waters.

• Prajāpati also says :

On failure of the *bandhus*, (the debts owed to a brāhmana) should be given to brāhmanas or thrown into the water; for, whatever wealth has been thrown into the water or fire is of benefit in the next world.

When, however, after the (amount of a) debt has been thrown into the water or the like the creditor returns, he shall surely obtain it.

Here ends the section on recovery of debts.

1. The reading in the text is rather difficult to construe. The reading of the Vir. ' dhanam yadyās'ritam striyā ' is better and means 'if the husband's assets came to the woman'.

2. Vide notes to V. M. p. 843 for various explanations of this verse. The son who has property should pay his mother's debts, even though she forsakes him, if she is poor.

3. Compare Yāj. II. 45, Manu VIII. 166. Vide *Bhala v. Parbhu*, 2 Bom. 67 at p. 72 and 48 All 604 at p. 606 (where when a woman succeeded as mother to her deceased son and alienated certain property to pay off her husband's time-barred debts it was held that she had no authority to do so).

4. ' Sakulyas ' are members of the same *gotra* as himself (i. e. uncles and their sons, grand-uncles &c) and *bandhus* are cognates like the maternal uncle and his son. If the creditor was a ksatriya, vais'ya, or s'ūdra, then instead of throwing the debt into water, it was to be paid to the king. The king was the ultimate heir except to the wealth of a brāhmana.

* P. 190 (text)

(Now (the treatment of) deposit.¹

Nārada (p. 120 v 1) says

Where a man without any suspicion entrusts any property of his own to another in confidence, that is said by the wise to be the title of law called deposit. What is deposited under seal without being counted or being shown should be known as *upanidhi* and *nikṣepa* is known to be made after counting (the contents)

Bṛhaspati (p. 333 vv 6 and 8) says :

The merit which accrues to a man making a gift of gold, baser metals, clothes and the like belongs to him who preserves a deposit or who protects one who seeks protection. A deposit must be returned to that very man who kept it in deposit and in the same manner and state (in which it was deposited) it must not be delivered to one who claims propinquity to the depositor.

* *Nyāsaḥ* means *nikṣepa* (deposit) *pratyānantaraḥ* means, ' a near kinsman of the depositor ' Manu (VIII 191) says

He who does not return a deposit or demands what he never deposited shall both be punished like a thief or should be made to give a fine equal to the thing bailed

Bṛhaspati (p. 333 v 11) says

If the depositary (or bailee) were to allow the deposit to perish by making a difference (in the care bestowed upon it as compared with his own chattels) or by his indifference or were not to return it when requested to do so he shall be made to pay it (its value) together with interest

Bhedaḥ means making a difference in the care bestowed upon one's own property (and on a deposit) therefore no blame attaches (to the depositary) if (the deposit) be destroyed through indifference together with the depositary's own goods.*

Yājñavalkya (II. 67) says

If the (bailee) of his own sweet will (i. e. without the bailor's consent)

1. The terms *nikṣepa*, *upanidhi* and *nyāsa* are often used as synonyms, but were also differentiated in meaning. *Nikṣepa* is a deposit entrusted to a man in his presence after counting before him the coins &c. *upanidhi* is the deposit of articles enclosed in a sealed box or envelope (the articles not being counted in the presence of the depositor) *nyāsa* is a deposit not made in the presence of the depositor but handed over to persons in his house for being given into his custody. Vide Vlt. p. 331 (for all three) and Mit. on Yaj. II. 67 (for *nyāsa* and *nikṣepa*) Yaj. II. 63 defines *upanidhi* as done by the Mit. Manu VIII. 185 employs both terms, *nikṣepa* and *upanidhi*. Vide notes to Kāt. v 322.

2. In Manu VIII. 185 the same rule and the word *pratyānantara* occur and Kṛṣṇaka explains that while the depositor is alive it should not be returned to his son or any one else who would be the owner immediately after the depositor.

3. Compare this with section 181 of the Indian Contract Act.

P. 191 (text),

makes a living (by the use of the deposit) he should be fined and made to return the deposit with interest

' Ājivan ' (in Yāj) means ' subsisting by enjoying it, or by letting it out at interest, ' udayah ' means ' interest '. Kālyāyana mentions a special rule about interest :

A deposit, the balance of interest, purchase and sale—these if not returned (or paid) when demanded bear interest at five per cent (per month).¹ Manu (VIII 192) says :

(The king) should inflict on a depositary who denies (or conceals) a deposit a fine equal to it (in value), specially so should the king (fine one) who conceals (or denies) an *upanidhi* (deposit of a sealed box &c)

* Brhaspati (p. 333 v. 10) says

If a deposit were to be destroyed together with the goods of the bailor through the adverse act of fate or the king, then no blame attaches (to the bailor).

Yājñavalkya (II 66) says .

(The bailor) should not be made to return what was carried away (or lost) by fate, the king or thieves²

Manu (VIII 186) says

A depositary who of his own accord returns (the deposit) to the nearest (relative) of the deceased (depositor) should not be proceeded against by the king nor by the relatives of the depositor.

' Pratyantarah ' means ' the nearest '. The meaning is that he (depositary) should not be proceeded against (or harassed) for more in the absence of evidence Brhaspati (p. 334 v. 15) extends all these rules about *nikṣepa* to other matters also .

This same law is declared in the case of a bailment for delivery (to a third person), a loan for use, an article delivered to an artisan (for being worked up), a pledge, a person who seeks protection.³

' Anvāhitam ' is that which is handed over to another person with the words ' so and so deposited it with me and you should deliver this to him ' ; ' yācitaka ' is an ornament or the like borrowed on the occasion of a marriage or the like for show ; ' śilpinyāsa ' means ' what is made over to a goldsmith or the like for being made into an ear-ring or the like '. Nārada (p. 123 v. 14) also says :

† The same rules apply in the case of *yācita*, *anvāhita* and the like and in deposits with artisans, in *nyāsa* and *pratinyāsa*

1. This verse occurs above (text p. 169 and translation p. 190)

2. The mention of fate and the king is illustrative of every calamity that is irremediable or irresistible.

3. ' Bailment for delivery ' where A makes a deposit with B and B hands it over to C for being delivered to A, this is *anvāhita*. Vide Mit. on Yāj, II 67.

* P. 192 (text). † P. 193 (text).

'Pratinyasah' is when the owner deposits with a person who redeposits it with another.¹ Kātyāyana ordains the restoration in certain cases of deposit made to an artisan even when it was destroyed by an act of fate or the king.

If an artisan agrees to work up a deposit in a definite number of days and keeps it with him beyond those days he should be made to pay (the price of) it even if it were gone (lost) through the act of fate.² Nārada (pp 150-151 vv 8-9) says

Wearing apparel loses the eighth part of its value on being washed once (for the first time) the fourth part (on being washed) twice (for the second time) the third part (on being washed) for the third time and one-half on being washed for the fourth time. After one half of the original value is lost one fourth of the value will be reduced in order (for each further washing).³

Yājñavalkya (II 288) says

A washerman on wearing the garments of another (handed to him for washing) shall be fined three *paṇas* and ten *paṇas* in cases of male hiring out pledge loan for use (without hire).

Avakrayah means delivery to another for hire. *Edhānam* means making a pledge of it. The same author (Yājñavalkya II 178) states the rules about the reduction (of weight) in metals other than gold when they are heated in fire.

Gold is not reduced (in weight) by fire in silver (the reduction) is two *palas* in a hundred in tin and lead it is eight (*palas* in a hundred) and in copper it is five and in iron ten.

* In the case of reduction (in weight) of silver and the rest exceeding these (limits) the goldsmith and others are to be fined. The same author (Yājñ II 179) declares a special rule as to increase (in weight) in certain cases when yarn has been given for (being woven into) cloth.

In the case of woollen and cotton yarns the increase (in the weight) is ten *palas* in a hundred in (cloth of) middling quality it is five *palas* (in one hundred *palas*), in (cloth of) fine quality it is declared to be three *palas* (in one hundred).

The same author (Yājñ II 180) declares that there is a reduction (of weight in cloth) in certain cases.

A reduction of a thirtieth part is allowed in the case of cloth on which figures are drawn and of cloth embroidered with hair there is neither reduction nor increase (of weight) in the case of silken cloth or bark cloth.

1 According to the Mīt. on Yājñ. II. 67 *pratinyāsa* is a mutual deposit, both sides delivering articles for safe custody as occasion arises. The Mayūkha takes it in the sense of a deposit of a deposited article.

2 Compare section 101 of the Indian Contract Act.

3. If clothes are washed only once and then lost by the washerman, he has to pay their price minus one-eighth.

' Kāimiko ' means ' in working figures of the *svastika* and the like with fine silken thread on cloth already woven ' If something was delivered to an artisan (for being worked up) and a time was fixed (at the end of which the finished article was to be delivered) and (the owner of the raw material) made a demand before the time fixed had elapsed, the artisan would not be liable even if the article were lost when not returned on demand. The same author declares this

If an artisan (after the owner of raw materials made them over to him) for a particular purpose or after fixing a time (for delivery of the finished article) were requested (to return the materials) when the article was only half finished, he (the artisan) is not to be made to deliver the article or its price because (the finished article) was not obtained (through act of God or king)¹

The reverse of this is laid down by the same author

When the time (fixed) has elapsed and the purpose is served, if the artisan does not deliver it though requested, he would have to pay the price, if the article be destroyed or stolen

* The same author says

He who having taken a *yācitaka* (loan for use) does not deliver it even on demand should be restrained and forcibly made to return it and fined if he does not return.²

Here ends the section on deposits.

Now begins ' sale without ownership '

Vyāsa says :

What is borrowed for use or what is entrusted to a man for being delivered to a third person or a deposit or the wealth of another that is stolen-when these are sold behind the back of the (true) owner, it is known as sale without ownership.³

Kātyāyana says

1. This and the following two verses ascribed to Yāj. here are not found in the printed text of Yāj. and are ascribed to Kātyāyana by other writers The Sm C. and Vir hold that this verse and the next apply to *yācitaka* and explain them differently, vide notes to V. M. pp. 355-356 Compare section 159 and 160 of the Indian Contract Act

2. The lender had not to resort to the several means of persuasion &c. as in the case of a debt, he could at once resort to *bala* and if the borrower did not deliver even then the king would fine him

3. ' Sold '— this includes a gift and a mortgage.

* P. 195 (text)

A sale gift or pledge made without ownership should be rescinded (or cancelled)¹

Asvāmī (in Kātyāyana) is a separate word and is an adverb Nārada (pp 144-45 vv 2-8) says :

A purchase effected in public is blameless, (but) the purchaser incurs the charge of theft by purchasing clandestinely If a man buys from a slave who is not authorised by his master (to sell) or from a rogue (a bad character) or in secret or at a low price or at an improper time he is as guilty as a thief²

Tad-dogaḥ means the guilt of a thief Yājñavalkya (II 171) says

*Proof of the ownership of a thing lost (or stolen) must be given (by the owner) by means of title or possession but otherwise on failure of such proof by him he should pay to the king a fine equal to a fifth part (of the property claimed)³

Pañcabandhaḥ (in Yāj) means a fifth share (of the price) of the thing lost When the witnesses adduced by the person claiming an article as lost by him depose contrary to his claim Vyāsa prescribes a fine double of (the price of) the thing lost

If the claimant does not establish by (the evidence of) witnesses that the thing sought (or claimed) by him is his he should be made to pay a fine double (of the price of the thing) and the purchaser is entitled to (retain) the thing⁴

The same author prescribes the course to be followed by the purchaser

When the seller is produced the purchaser should not in any way be proceeded against but it is ordained that there is to be litigation between the seller and the man claiming the thing as his own (and lost by him)⁵

Bṛhaspati (p 335 v 3) says :

1. The Vir regards asvāmīvikraya as one word and dissolves it as asvāmīvikram vikrayam Vide Manu VIII. 129

2. Compare Visṇu V 164-166. From a slave — this is only illustrative and includes minors and other dependents who have no authority to sell.

3. This applies to a case where A claims that he is the owner of a thing which he had lost or which had been stolen from him and which he finds in the hands of B who claims to be a bona fide purchaser from C. A, claiming to be the original owner must prove his ownership by showing title (by purchase partition &c.) or his previous possession and is spoken of as nā jñā in the text. Manu X 115 mentions seven general sources of title and Gautama six.

4. This prescribes a fine double of the price of the thing and the proceeding verba only one-fifth. The heavier fine is meant for serious cases of false claims.

5. Mūla is a term applied to the seller when there is a claim made by another man that the thing sold belonged to him and had been lost by him.

Where the seller pointed out (or produced by the purchaser) has been defeated in the lawsuit he should pay to the buyer and the king the price and a fine (respectively) and the thing (in dispute) to the owner.¹
Kātyāyana says

If the purchaser cannot point out (or produce) the seller, he should clear his purchase (as overt) Time for producing the seller should be given (to the purchaser) according to the extent of the distance. When he (the buyer) has cleared his purchase (as overt and so legal) he should not be blamed at all by the king. The claimant² should first establish by means of his kinsmen (as witnesses) that the thing (in dispute) was his Afterwards the buyer should establish in order to clear himself his purchase (as overt and so bona fide) by (the testimony of) his kinsmen

*Even if the purchaser proves the purchase (as overt), still the property does revert to the claimant to whom it belonged (and who had lost it). So says Manu (VIII 202)

If the seller cannot be produced, the purchaser is let off by the king without fine and the person claiming the thing as his and lost by him gets it back when it is established to have been purchased openly ' Anāhūrya ' (in Manu) means ' not having pointed out (or produced) ' The meaning is ' the thing that is cleared by its being proved that the purchase was made openly ' Kātyāyana says

(A purchaser) who does not produce (or keep present before court) the seller or who does not establish the purchase (as overt) should be made to pay to the owner the price (of the article) as claimed in the plaint and a fine (to the king)
Brhaspati (p 335 vv 7-8) says

When a purchase has been made before (i e to the knowledge of) a row of traders and to the knowledge of the king's officers, but the purchase is made from one whose habitation is not known or the vendor is dead, the real owner (of the thing thus sold away without title) will recover his chattel after paying half the price (to the purchaser), in such a case both (the real owner and the purchaser) lose a half on account of the popular usage (on such a point).³

Marici says

Where the vendor cannot be found because his dwelling place is unknown the loss should be assigned equally to both the purchaser and the claimant of the thing lost (by him)

1. Compare Yāj II 170

2 The ' claimant '— the person called ' nāstaka ' above

3 Each is to be blamed to some extent, the purchaser for buying from a man whose habitation was unknown to him, the real owner for being careless enough to lose his property ' Vyavahāyataḥ ' may also mean ' in the judicial proceeding ' or ' according to the rules of law. '

* P. 127 (text

' Nivśaś in (Mariś) means ' the residence of the vendor Nārada says

One should enjoy what is permitted (by the real owner) whether women, cattle or land but he who enjoys without being offered (or permitted) should be made to pay the profit of such enjoyment

* Uddiṣṭam means permitted bhuktābhogam means hire (or profit) in accordance with the enjoyment Yājñavalkya (II 178) says

The owner of a thing that was lost or stolen and was brought to the king by the toll-gate keepers or by guards shall recover it (from the king) within one year after that the king shall take it¹

As regards what Mann (VIII. 30) says

The king should keep in his custody for three years property the owner of which has disappeared (or cannot be found) the owner can take it (at any time) within three years beyond three years the king may retain it

that refers to property of which a brāhmana learned in the Vedas is the owner The same author (Mann VIII 33) says

The king remembering the righteous conduct of the good should take a sixth tenth or even a twelfth part of property which had been lost and was then found (by the king or his officers)²

Here in the first year (the king) should give up the whole of the property in the second year he should take a twelfth share and then give up the property, in the third year a tenth part in the fourth year and the rest a sixth. The words beyond (three years) the king should retain it are meant only to permit the disposal of the thing after three years if the owner does not come (within three years) if the owner comes, it must be restored to him even if disposed of This is what the Mīṭakṣarī says. This, however holds good only if the owner be unknown but when there is certain knowledge so and so went away forgetfully leaving this property then he recovers it even after three years and the king also has no authority to dispose of it. But he may take a certain portion for himself (for safely keeping the articles) Yājñavalkya (II 174) mentions the remuneration (or wages) for guarding for a day animals belonging to another that were found straying

(The owner of straying animals) should pay four paṇas if the animal be of the species with single hoofs, five for human beings, two paṇas for a buffalo camel and cow and one fourth of a paṇa for goats and sheep. But what was consumed by them must be paid for besides (the above)

On a treasure being found Yājñavalkya (II 34-35) says

1. Compare Gautama X. 36-38.

2. Various explanations are given as to when a sixth, tenth or twelfth share was to be taken. Vide notes to V M. p 301.

P 129 (text). ‡ P 120 (text)

The king having himself found a treasure¹ should give half of it to brāhmaṇas; but a brāhmaṇa (finding treasure), if learned should take (appropriate to himself) the whole, since he (learned brāhmaṇa) is master of everything. When a treasure is found by anyone else, the king should take a sixth part of it;² one who does not inform the king of the find should be made to restore (the treasure to the king) and also pay a fine.³

But when anyone proves by some distinctive mark or weight or otherwise that the treasure (found) is his, then the king should deliver it to him after giving a twelfth part to the finder and after taking a sixth for himself, as Manu (VIII 35) says :

When a man avers truthfully and says ' this is mine ', the king should take a sixth share from him and a twelfth also.

*The twelfth share is for the finder. On the subject of property stolen by thieves the same author (Manu VIII. 40) says

Property stolen by thieves must be restored by the king to the owner to whatever *varṇa* he may belong, if the king appropriates it to his use he incurs the sin of the thief⁴

Where the king is unable to recover property (from thieves) Kṛṣṇa-Dvaipāyana (Vyāsa) says .

If unable to recover property stolen by thieves, the king when so powerless shall make it good from his own treasury⁵

Here ends the discourse on sale without ownership.

Now begins the section on joint undertakings (or concerns).

Nārada (p 124 v. 1) says

Where traders and others carry on business (or transactions) jointly, that is declared to be a joint concern, which is a title of law

1. Nidhi means a treasure buried in the earth. Compare Manu VIII. 37 for a proposition similar to ' he is master of everything '

2. The Mit interprets this part differently as ' the king should give a sixth part to the finder ' (other than a brāhmaṇa or king) and keep the rest for himself. The Mit. quotes Vasistha III 13 in support. Vide Gautama X 43-45. The interpretation in the text is more natural and follows Aparārka.

3. Compare the Indian Treasure Trove Act (VI of 1878) sections 4, 10-12, 20 with these rules

4. Compare Yāj. II 36, Gautama X. 46, Viṣṇu III. 66,

5. Compare Gautama X. 47, Viṣṇu III. 67.

* P. 200 (text),

Bṛhaspati (p 837 vv 5-7) says

If one out of many (partners) being authorised by all gives property (i.e. enters into transactions of sale &c. with others) or causes a document to be executed it will be deemed to be done by all¹. In matters of doubt and in (cases of discovery of) fraud they are declared to be the arbitrators and witnesses among themselves provided they are not affected by enmity (among themselves). When anyone of them (partners) is found out to have practised fraud in sales and purchases (for the partnership) he must be cleared by oaths (and ordeals). This is the rule in all disputes (of this sort)

*Yājñavalkya (II 265 and 260) says

They should expel a crooked (fraudulent) partner without giving him any profit. One (partner) who is unable (personally to do work) should cause the partnership work to be done by another. If a loss be caused (to the partnership) because one did what was forbidden or did something without being asked to do so or through one's negligence he should make good that loss. That partner who saves (partnership property) from destruction is entitled to (an additional) one tenth share (as his reward).

Kātyāyana says

If artisans (of four kinds be jointly employed) viz. young apprentices, those who have studied the craft, those who are adepts in it and those who are teachers — they shall receive one after another in order one two three or four shares (of the profits of the undertaking)

Śiṣyākāṣṭh means apprentices abhijñākāṣṭh means those who know the craft kṣaṭh means experts kārṇākāṣṭh means those who introduce new methods. Bṛhaspati (p. 341 v 29) says

The headman among a number of workmen jointly building a mansion or temple or making utensils required for religious worship is entitled to two shares².

The same author (Bṛhaspati p 341 v 30) says

The same rules have been declared by the good for dancers but one who beats the tune (while others sing or dance) gets half a share while the singers get equal shares (with the dancers)³.

1. Compare section 251 of the Indian Contract Act.

2. Two shares — The headman gets as wages double of what other workmen get. The reading cārmikopaskarīpi (articles of leather) is bad, particularly when it has to be placed in juxtaposition to temples.

3. The chief dancer gets two shares like the chief among builders.

P 202 (text)

Kātyāyana says ¹

If any one from among them while they are scattered about (for pillage) is caught, then* they should contribute (or bear) according to their shares towards the payment of the ransom for securing his release. This is the settled rule as regards all that engage in (a joint) undertaking without (previously) defining their shares, such as traders, husbandmen, thieves or artisans.

Here ends the section on joint undertakings.

Now begins (the section on) resumption of gifts

Nārada (p 128 v 1) says :

Where a man wishes to resume what he has improperly given, that is a title of law called Dattāpradānika

'Asamyak' (in Nārada) is an adverb and means 'in a way that is forbidden'. The same author (Nārada p 128 vv 2, 4, 5) says

What may be given and what may not be given, valid gifts and invalid gifts — in judicial matters, the law of gifts is said to be thus fourfold. An *anvāhita*, a *yācitaka* (loan for use), a pledge, joint property, a deposit, son and wife, the whole property of one who has offspring and what has been already promised to another man—these have been declared by the (ancient) teachers to be inalienable (to be not proper subjects of gift) ²

Here as a man has no property over the series of objects ending with son and wife, the express prohibition of a gift with reference to them is mere *anuvāda* (a laudatory or condemnatory re-iteration) as in the case of the Vedic text 'neither in middle regions nor in the heavens' ³. This explanation

1 Nīlakantha introduces these verses rather abruptly. In other works there are two verses preceding the first verse quoted, which say that if certain adventurous spirits plunder the territory of an enemy king at the bidding of their king, they should give one-tenth of the booty to the king and divide the rest, that the head of the plundering party should get four shares, the intrepid ones three shares, the strong ones two and the rest one share each.

2 The words '*anvāhita*, *yācitaka*, *ādhi* and *nikṣepa*' have already been explained, 'son and wife'—these must be regarded as one item. Nārada (p 128 v 3) says that what may not be given is eight-fold. A person is not an absolute owner of what is *anvāhita* with him or of *yācitaka*, of a pledge, deposit or of property jointly owned with others or of son and wife.

3 One cannot make a gift of what one does not own. Nīlakantha established above (text p 92 and tr p 83) that there is no ownership in wife and son. Therefore the six objects ending with son and wife in Nārada could not be gifted away. But Nārada does say that they are '*adeya*' (using the potential passive participial). This is not a prohibition (*nīśedha*) properly so called, for a prohibition is made about something that might, in the absence of the prohibition, follow as a matter of course. There being no ownership in the six things and it being well-known that a gift can be made only of that which is owned by one, it is not necessary to prohibit. Therefore this is not a proper *nīśedha*. These words

* P. 202 (text)

also explains the *paryudāsa* (proviso) contained in the text of Yājñavalkya (II. 176) a man may give anything that does not cause detriment to one's family except¹ wife and son. The absence* of ownership in son and wife has been already propounded in the discussion on ownership (p. 83 above). In making a gift of these (that are mentioned in Nārada) not only will the gift be invalid in law but the man will be liable to undergo an expiatory penance as Dakṣa says with reference to these

That foolish man who makes a gift of these incurs the penalty of expiatory penance.

Manu says

He who receives what may not be given and he who gives what may not be given both of them should be punished like a thief and should be

only repeat what is already well-known, that is, they are merely an *anuvāda* (which is a variety of *arthavāda*) Nīlakaṇṭha cites a Vedic example of a negative clause being only an *anuvāda* and not a *nītedha* properly so called. In Tai. S. V. 2. 7 we have a sentence " The brahmayājins say fire should not be kindled on the bare ground, nor in the middle regions nor in the heavens. The rule about *agnicaryana* is that fire is to be kindled on gold and not on bare ground. It is not possible to kindle fire in the middle regions nor in the heavens therefore this prohibitory passage (*nūstārīkṣe na divi*) does not forbid what possibly might be done. These words contain only an *arthavāda* (of the *anuvāda* variety) and serve to bolster the kindling of fire on gold and censure kindling on bare ground. This text is dealt with in Jaimini I. 2. 5 and X. 8. 7. Vide notes to V. M. pp. 367-368 for further explanation. An *arthavāda* has three varieties *virodhe gupavādaḥ* *syād-ānuvādośvadhārite* ! *bhūtiarthavādas-tad-dhānād-arthavādīs-tridhī mataḥ* || When it is said *Aditya yūpaḥ* (the sun is the sacrificial post) it is an example of *gupavāda* as this is opposed to our perception, but the sentence has only a secondary sense (viz. that both *Aditya* and *yūpa* are brilliant) When it is said *agnir himasya bhoreḥ jam* (fire is an antidote to cold) it expresses what is well-known from the experience of our senses. So this is *anuvāda*. When it is said *Indra killed Vṛtra* it is *bhūtiarthavāda* since it is not opposed to any *pramāṇa*, nor is it known from any *pramāṇa* it only narrates a story.

1 When the negative particle *na* is employed in a passage the question often arises as to its exact import. In some cases it has the sense of *pratijedha* (prohibition) as in he does not take the *podas* ! *oup* in *Atirātra* sacrifice. Sometimes *na* has the sense of an *arthavāda*, as in neither in the middle regions nor in the sky discussed above. In some cases *na* has the sense of *paryudāsa* (an exception or proviso) A Vedic example is the *śuklata* should not see the rising sun, which passage is preceded by the words *tasya vratam* (his observance) An observance is something positive therefore he should not see &c. does not prohibit the seeing of the rising sun but only enjoins that he should make a resolve not to see the rising sun. Yājñavalkya's rule is what a man owns may be given. The words except son and wife constitute an exception. Just as in Nārada's verse *anvāhitam* &c. several things are declared to be *adaya* though over the first six of them there is no ownership (and so the negative particle is construed as an *anuvāda*) so Yaj. excludes son and wife from *adaya* things though they are not of the same nature as other things (over which there is ownership) This is the idea conveyed by the words this explanation also explains &c. Vide notes to V. M. pp. 363-370 for detailed explanation. Dakṣa enumerates nine things as *adaya*.

made to pay the highest amercement.¹

What may be given is thus declared by Brhaspati (p. 312 v. 3) .

What remains after (providing) for the food and clothing of the family may be given.

Kātyāyana declares what must be given (without fail) .

He who, having voluntarily promised a gift to a brāhmana, does not deliver it should be compelled to give it as if it were a debt and should be fined the first amercement.

Gautama (V. 21) says ' one should not give, even after promising to give, to a man who does what is forbidden ' (by the s'āstras) Vyāsa forbids the gift or sale of means of livelihood ²

Those who are born and those who are yet to be born and those who are in the womb wish for means of livelihood ; so no gift nor sale (of *ṛtti*) can be effected).

Nārada (pp. 128-129 vv. 3 and 8) sets out the various kinds of valid and void gifts :

*Of valid gifts there are seven varieties and invalid gifts are of sixteen varieties. The price paid for goods, wages, what is paid for pleasure (from dancers or bards), a gift through affection, a gift from gratitude, a gift to a bride's kinsmen and gifts for charitable purposes—these are known as valid gifts by those who have knowledge of gifts.

' Anugraha ' means ' dharmā ' (religious and charitable purposes) Nārada (pp. 129-130 vv. 9-11) says :

Invalid gifts are (sixteen) as follows . What has been given by men under the influence (or pressure) of fear, anger, pangs of sorrow, or as a bribe or in jest, or under misapprehension (as to person or thing), or through fraud, or given by a child or by a fool or by one who is not his own master, by one who is distressed, by one intoxicated, by one who is, insane; or what is given from the desire of a reward thinking ' this man will do me some good turn ' ; what is given through ignorance to an undeserving person because it was proclaimed that he was a worthy person, what is given for a purpose which is really sinful (though thought to be meritorious)—all these are known to be invalid gifts ³

1. Manu VIII. 138 lays down 1000 paṇas as the highest amercement, 500 as middle and 250 as first, and Yāj. I. 366 prescribes 1080 as the highest fine, half of it as middling and quarter of it as first or lowest

2. ' Adharmasamyukta ' in Gautama means one who is guilty of visiting a prostitute and such other censurable conduct. ' Ṛtti ' — Mandlik takes it in the modern sense of ' a religious office such as that of a village priest ' by which a man makes his livelihood, but it is not necessary to do so

3. In *Javerbat v Kablibat* 15 Bom 326 at p. 336 it was said that Nīlakaṇṭha does not place a conditional gift amongst those which are essentially void and that in the works of other Hindu writers the word ' upādhi ' usually implies fraud and not merely condition. With the last two in Nārada compare Manu VIII. 212.

* P. 204 (text).

Ruk means 'pain'. The construction is by those who are under the influence of pain caused by fear and the rest : a. the meaning is given by one who was oppressed by the fear of being beaten &c. in the same way what was given (to others) through anger against brothers with the idea that loss may be caused, *vyatyakṣaḥ* is when a man intending to give silver gives gold through mistake *chalayogataḥ* occurs when (for example) knowing that a king wanted to give a cow to Devadatta it was given to another who dressed himself like Devadatta even though the recipient was a worthy man *ṛtaḥ* means one whose mind is restless through disease, *matṭaḥ* means intoxicated by some intoxicating drug, *unmatṭaḥ* means affected by wind (delirium) *apavartitam* means given what was given with the thought he would do me a good turn to one who does not do it what was given with the idea that one (the donee) will employ it for religious purposes but who employs it for sinful purposes. These (gifts) return (to the donor). *Kātyāyana* says

* What is given through lust or wrath or by those who are dependent by those distressed by those frightened by lunatics or by those who are infatuated or what was given for avoiding (the consequences of) lapses (from the right path)—these may be taken back¹

Kāṁāt means for seducing the wife of another, *klibaḥ* means one frightened, the meaning of *vyatyakṣa dattam* is bribe.

What is promised as a bribe to a man for accomplishing a certain object need never be given even though the object be accomplished. If the bribe were given before (the object was accomplished) it should be returned by force (to the giver) and a fine eleven times as much (as the bribe) should be levied. This is what the followers of Garga and Manu say²

The same author (*Kātyāyana*) describes the nature of a bribe

That is said to be *utkoca* (a bribe) which is obtained by them, viz. by giving information about a thief about a felon, about one who breaks the rules of decent conduct about an adulterer by pointing out those who are of bad character by spreading false reports about a person³

Manu (VIII 166) says

A fraudulent mortgage or sale, a fraudulent gift or acceptance and everything else wherever (the king or judge) finds deceit—all these he should declare to be void.

1. Compare Gautama V 22 and Bṛ p. 318 vv 9-10.

2. These two verses are quoted in *Śrī Sikṛam* v *Śrī Harikar* 25 Bom 102 at p. 180 where it was held that if an adoption was induced by a bribe given to a widow the bribe was an illegal payment and cannot support a sale or gift.

3. Giving information about a thief — either suppressing information about a person who is really a thief or threatening a person that he would be reported as a thief

'Yoga' means 'fraud'; 'yayā' means 'in whatever other transaction'. The meaning is that 'all that return (to the donor) when the fraud vanishes (i.e. is detected)'. Kṛtyāyana says:¹

If a gift was promised by a man for a religious purpose, whether when in good health or when afflicted with disease, the son should be made to pay it if the father (the promisor) die without actually handing it over; there is no doubt on that point.

Further elucidation on this point will be found in my revered father's *Draṇamāna*.

Here ends (the section on) resumption of gifts.

Now begins (the section on) the breach of a contract of service.

Nārada (p. 131 v. 1) says:

When a man having agreed to serve does not carry out the agreement, it is termed a breach of the contract of service, a title of law.

Bhāṣya (p. 315 v. 10) says: that servants are of three kinds:

The armed fighter is declared to be the highest, the cultivator the middling one, the porter is declared to be the lowest and so is (a servant) employed in household work.²

Nārada (p. 135 v. 21) says:

One who is appointed over all (servants) and (to supervise) over the household should also be regarded as a labourer and he is known to be

1. It was said above that a gift by one who is 'Śrī' is void, an exception to that is stated in this verse. The only case where an incomplete gift not actually made but remaining only in promise was enforced by the courts in ancient India was a gift promised to a brāhmana (vide Kṛtyāyana quoted above on p. 233) and a gift for a religious purpose. This verse contains the germ of the idea of a will since here the mere declaration of the intention of a man to give for religious purposes is made enforceable after his death. In modern times a mere gift for *dharma* without specifying any particular object is declared to be void for uncertainty. Vide 6 Bom. 21, 11 Bom. 482, 17 Bom. 351, 18 Bom. 186, 23 Bom. 725 (P.C.) at p. 735 (= 26 I.A. 71). But this is opposed, as pointed out in 80 Mad. 810 to the spirit of ancient Hindu Law. Vide Manu IV. 227 for *dharma* meaning 'īṣṭa' (religious purposes) and 'pūṛṇa' (charitable purposes). This text of Kṛtyāyana is the basis of the Hindu Law of religious Trusts. Vide *Ghelaḥari v. Uderam* 36 Bom. 29 at p. 35 (where the verse is quoted) and *Bhupati Nath v. Ram Lal* 37 Cal. 128 (F.B.) at p. 137 (where also Kṛt is quoted). In many of the earlier reported cases it was laid down as a general proposition that under Hindu Law a gift was invalid without possession. Vide 4 Bom. H.C.R. (A.C.J.) p. 31, 10 Bom. H.C.R. 491. But since *Kahidas v. Kanhaya Lal* L.R. 11 I.A. 218 it has been held that possession is not absolutely necessary to constitute a valid gift under Hindu Law. In *Bhaskar v. Sarasvatibai* 17 Bom. 486 (at p. 491) it is said (approving Mayne) that Hindu Law properly so called appears to lay little stress on any such rule as applicable to gifts.

2. Compare Nār p. 131 v. 23 for the same three classes and examples.

* P. 206 (text).

kaṣṭumbika (the general family servant).

Kātyāyana says

According to Bhṛgu one who is free by giving himself (to another) becomes a slave like a wife.¹ Slavery should be known as limited to three varṇas (classes) in no case can a brāhmana become a slave. *Slavery of men of the kṣatriya vaiśya and śūdra classes who give up their freedom is to be in the descending order of the classes and not in the inverse order.²

Nārada (p 187 v 89) says :

Slavery is not ordained in the inverse order of the (four classes)³

Kātyāyana says

Where the three twice-born classes are fallen from the order of asceticism there (the king) should banish a brāhmana (apostate) and a kṣatriya (apostate) should be reduced to slavery. This is the view of Bhṛgu.

The mention of kṣātra (in Kātyāyana) is intended to include the vaiśya and śūdra also.⁴ Dakṣa and Nārada describe the method of banishing a brāhmana.

He who having entered the order of asceticism does not abide by the peculiar duties of that order should be instantly banished by the king after having branded on his skin the mark of dogs foot.

Kātyāyana says

A brāhmana should not be made a slave even to a brāhmana. But a brāhmana may if he so desires, do work for another brāhmana who is possessed of good character and Vedic learning and to whom he is inferior (in these respects) But even then a brāhmana should not do impure

1 Just as a woman by rendering up her person to her husband as his wife becomes his dependent, so when a free man offers himself as belonging to another, he becomes a slave.

2 The first half is the same as Yāj. II. 183 (latter half). A kṣatriya, vaiśya or śūdra can be the slave of a brāhmana, a vaiśya or śūdra can be the slave of a kṣatriya and a śūdra of the vaiśya.

3. The latter half of this verse is except where a man violates the duties peculiar to his class and status. Slavery is like the condition of a wife. A brāhmana could marry a girl of his own or of any of the three other classes so a kṣatriya or vaiśya could be the slave of a brāhmana but just as a kṣatriya or vaiśya male could not have as his wife a girl of a higher class, so a man of a higher class could not be the slave of one of a lower class. Nārada says generally that a man who violates the duties of his caste may become the slave of one of a lower caste, while Yāj. II. 183 restricts this general rule by saying that one who is an apostate from saṁnyāsa (even though a brāhmana) becomes the slave of the king alone but Kātyāyana prescribes that a brāhmana apostate from saṁnyāsa should be banished and any one of the other classes should be made a slave of the king.

4 This note of Nīlakaṇṭha shows that he held that even śūdras could go into the order of saṁnyāsa. But the trend of the dharmasūtras and other ancient authorities is that a śūdra could not be a saṁnyāsin. Vids 39 Bom. 168 at p. 174 where it was assumed that saṁnyāsins are confined to the three higher castes.

work (even for a learned brāhmana).¹

Manu (VIII. 411) says :

* A brāhmana should support without harshness a kṣatriya or a vaiśya distressed for his livelihood; he should make them do work (befitting them) if they were their own masters

' Svāmikarma ' means ' work of a higher kind suited to their caste '.
Kātyāyana says .

He who takes a brāhmana woman and also he who sells her should be fined by the king who should make that transaction (of sale and purchase) null and void . He who enslaves a woman of a respectable family that took shelter with him at her pleasure (or through lust) or who transfers her to another shall be punished and his act shall be annulled. He who enjoys the nurse of his child or one who is not a nurse or the wife of his attendant as if she were a female slave would incur the lowest amercement.

Viṣṇu (V 151) says . ' one who employs a man of a higher caste as a slave shall be fined in the highest amercement. ' ² Kātyāyana says :

He who wishes to sell a female slave faithful to him who cries (when about to be sold), being able and not in any difficulty, would incur the lowest amercement

Nārada (pp. 135-137 vv. 26-29, 37, 30) describes the varieties of slaves :

One born at (his master's) house, one purchased (for money), one received (by gift and the like), one obtained by inheritance, one maintained during a famine, one pledged by his master, one released from a heavy debt, one made captive in a fight, one won through a wager, one who approaches saying ' I am thine ', one fallen from asceticism, one enslaved for a stipulated period, one who becomes a slave for maintenance, one enslaved on account of connection with a female slave, one sold by himself—these are the fifteen classes of slaves declared in the śāstras . Among these the group of the first four cannot be released from slavery except by the favour of their masters , their bondage is hereditary . That wretched man who, being free, sells himself is the vilest of these (fifteen varieties). He also cannot be released from bondage . He out of these (fifteen), who saves his master from danger to life, would be free from the state of

1. Nārada (p 131. vv. 5-7) divides work into pure and impure and says that pure work is done by labourers and impure by slaves and then sets out impure work as ' swooping the gateway, the privy, the road and the place for rubbish, shampooing private parts &c'.

2. This may refer to a brāhmana being made a slave or to the fact of a man of a lower class employing as a slave one of a higher class.

* P 208 (text), † P. 209 (text)

slavery and shall get a son's share (out of his master's wealth)¹;
Yājñavalkya (II 183) says :

He who falls from asceticism becomes the king's slave for life²
Nārada (pp. 133-137 vv 31-34) says

One maintained in a famine is released from bondage if he gives a pair of oxen. A slave who is pledged becomes free (from pledge's slavery) when his master redeems him by paying off the debt. A debtor is freed from slavery by paying his debt with interest. One who approaches saying ' I am thine ' one made a prisoner in war and one won in a wager—these are released on giving a substitute who will do some work.³ A slave for a stipulated period gets release on the expiry of the time fixed. *The slave for maintenance is released at once from the moment the master ceases to give him food. One enslaved on account of (connection with) a female slave is released on parting from her.

Pratīṣṭhā means a substitute. 'Vadavā means a female slave.
Yājñavalkya (II 183) says

One who is forcibly made a slave and who is sold as a slave by robbers is released (by the king if the master does not release him).⁴
Nārada (p. 133 v 40) says

If one who is not free offers himself as a slave (to another) saying ' I am thine ' the slave would not secure his desire, but the former master can recover him.

Asvatantarā means the slave of another. In this section the masculine gender of the word 'dān' being not intended (to be strictly taken), it should be understood that all these rules apply to a female slave also. Kātyāyana states a reason for enfranchising a female slave.

He, who has intercourse with his female slave who bears issue to him in consequence should make her together with her offspring free from slavery, having regard to the seed.

Bijam means child. The meaning is considering the fact of the child being of good qualities.⁵ Nārada (p. 133 vv 42-43) says

1. One born at his master's house — means born from a female slave of the master. He is otherwise called garbhādā. Bhaktādā means one who says " I shall be your slave till I shall pay off the price of the food I have eaten " or one who says " I shall be your slave as long as you give me food. " Who saves his master &c. —The Mit on YJ- II 183 says when he saves his master attacked by robbers or a tiger. One enslaved..... female slave — means ' one who being in love with a female slave marries her and enters the household as a slave. "

2. That is, he could not be a free man by the favour of his master or by imperilling his life for saving his master.

3. The reading tulyakarmāṇi is much better. It means a substitute who is able to do as much work as these slaves.

4. Compare Nār. p 137 v 33.

5. Vide notes to V M. p 230 for other explanations.

One who, being pleased in his mind, desires to emancipate his own slave should take from his (the slave's) shoulders a jar filled with water and smash it to pieces. He should sprinkle his (slave's) head with the water containing whole grain and flowers and having declared thrice ' you are not a slave ' he should dismiss him with his face turned towards the east. *Thenceforward he should be spoken of as ' svāmyanugraha-pālitaḥ ', the master may partake of food cooked by him and presents may be accepted from him and he becomes respected by the good.¹

Kātyāyana says .

A female who is not a slave, if married by a slave, would also be a slave, for her husband is her lord and the lord is dependant on his master. Of the wealth that belongs to a slave the master of the slave is regarded to be the owner.²

Thus ends (the section on) breach of contract of service.

Now begins (the section on) non-payment of wages.

Nārada (p 139 v 1) says

A series of rules for payment and non-payment of the wages of labourers is declared (hereafter); that is known to be the title of law called ' non-payment of wages '.

Yājñavalkya (II. 194) says .

He who without settling the wages to be paid causes work (to be done) should be made by the king to pay a tenth part (of the profits) of trade, cattle or crop

This refers to light work. As regards heavy work Brhaspati (p 345 vv. 12--13) says

A cultivator of the soil should take a third or fifth part (of the produce), a cultivator to whom food and clothing are given should take a fifth part of (the crop raised by) his plough ; while one who is not so provided should take a third part of the crop produced.

' Bhaktācchādabhṛtaḥ ' means ' maintained by giving food and raiment.

¶Nārada (p 140 v 5) says .

He who does not perform work that he has promised to do should be

1. ' Vaktavyaḥ &c. '— this would also mean ' he should be addressed as an equal by his former master ', ' svāmyanugraha-pālitaḥ ' would then mean ' being saved by the favour of his master '. ' Pratigrāhyaḥ ' would ordinarily mean ' presents may be made to him '.

2 As to this last compare Manu VIII. 416 and Nār p 138 v. 41 which prescribe that whatever a wife, a slave or a son may acquire shall belong to him to whom they belong. The V. C. and V. R add a half-verse, which says that what a slave gets by selling himself and whatever he gets as a gift from his master through favour do not belong to the master.

* P. 211 (text). ¶ P. 212 (text).

compelled to do it after giving him the wages. If he does not perform it after having taken wages, he would incur liability to pay back twice the wages.¹

Manu (VIII 215) says

" A hired workman, who without being ill, does not perform through insolence work as agreed upon should be fined eight kṛpālas and no wages should be paid to him "²

The same author (Manu VIII: 217 and 218) says

He, who whether well or ill does not perform the work as agreed, shall have no wages paid to him though the work left unperformed be only a small part. But a labourer who was ill may when he becomes well perform his work as at first agreed upon and would get his proper wages even after the lapse of a long time

Viṣṇu (V 153-154) says A hired labourer leaving off work before the stipulated period expires shall forfeit the whole price of his labour and should pay to the king a hundred paṇas. The same author (Viṣṇu V 157-159) says If the master dismiss the servant before the expiry of the stipulated period he shall pay to the servant his whole wages and a hundred paṇas to the king, except in cases where the servant is to blame.³ Vṛddha-Manu says

A servant should be made to pay the value of what he lost through carelessness and twice the value of what he lost through hatred (of the master) but he should not be made to pay anything for what was stolen by thieves nor for what was burnt nor for what was carried away by water

* Drohaḥ means hatred, Ujham means carried away
Yājñiavalkya (II. 197-198) says

One who causes an obstacle (by refusal to work) just at the (suspicious) time of starting should be made to pay twice the wages, if (he causes obstacle) after starting he should be made to pay a seventh part, but the fourth part if he leaves off on the way

Vṛddha Manu says

If a merchant dismisses the servant on part of the journey after selling the merchandise, he (the servant) too must be paid but he shall receive half the wages

Kaṭyāyana says

If the goods be detained or seized on the way he (the servant) would obtain wages in proportion to the distance traversed That master who

1. Compare Yāj. II. 173.

2. A kṛpāla (otherwise called valīla) is a little less than two grains. Five kṛpālas made one māka and 16 mākas made a suvarpa, but two kṛpālas made a mīka of silver. Vide Manu VIII. 131 185 and 186; I 302 303.

3. The fault of the servant must be theft and the like and not eating large quantities of food &c.

deserts on the way his servant who is helpless, tired or afflicted with disease will incur the first amercement, if he does not wait for three days in the village (after the servant gets ill).

' Āsiddhyeta ' means ' is detained or attached by the king's order '. Brhaspati (p 346 vv. 17-18) says

When a servant being enjoined by the master (to do something) does an improper act (such as theft) for the master's benefit the master shall be held responsible for it That master who does not pay the wages of labour even after the work is finished shall be compelled by the king to pay it and also a proportionate fine¹

Nārada (p 141 v 7) says

(A merchant) who after having hired vehicles and beasts of burden does not carry his merchandise by means of them shall be made to pay a fourth part of the hire, and the whole hire if he leaves them half way.

* ' Yānam ' means ' chariot and the like ', ' vāhanam ' means ' direct vehicles such as horses ' Kātyāyana says

He who having hired elephants, horses, bullocks, asses, camels and the like does not return them when his object is fulfilled shall be made to pay (the hire) till he returns them.

Nārada (p 143 vv. 20-21) says

If a man builds a house on the land of another and lives in it paying rent (for the land), he may take with him when he leaves it the thatch, the timber, the bricks and the like (building materials) But if he has resided on the ground of another without paying rent and without any definite agreement, he shall, when he leaves the house, make over to the owner of the ground, the thatch and the timber and the bricks laid (as walls)

' Stomah ' means ' hire '

Here ends (the section on) non-payment of wages.

Now begins (the section on) transgression of conventions.

Nārada (p 153 v 1) says :

The established conventions (or rules) among heretics, *naigamas* and the like are styled *samaya* (compact, usage) That is known to be a title of law called ' non-violation of conventions '²

1. It is better to read ' vinayam ' for ' vetanam '.

2 ' Samayānapākarma '— Anapākarma is used in Manu VIII 4 with reference to ' gifts ' and ' anapakriyā ' which is similar to ' anapākarma ' in derivation is used with reference to gifts and wages in Manu VIII 214 Nārada has ' vetanasyānapākarma ' and ' samayasyānapākarma ' It is difficult to give an exact rendering of anapākarma'.

* P. 214 (text)

* Pākhaṇḍīnaḥ means persons engaged in trade who are opposed to the path laid down by the Vedas naigamāḥ are those (traders) who are not opposed to the Veda, by the word Edi persons learned in the three Vedas are included. Bṛhaspati (pp 846 847 vv 2-3) declares the duty of the king in these matters.

(The king) should bring and establish there (in his kingdom) brāhmaṇas proficient in the Vedas and lore, learned brāhmaṇas and those who keep sacrificial fires and should assign to them means of livelihood He should donate to them houses and lands from which no taxes are levied having declared in a grant of his that they would be free from liability to pay in future (the king's dues on land cultivated by them)¹

' Anāchedyakarāḥ means on which taxes are not levied Muktabhāvyāḥ means ' the future (share of the king in the) produce from the soil of which is given up Yājñiavalkya (II 186) thus speaks about the peculiar rules of learned brāhmaṇas and the like

Whatever rules are established by the king or by local conventions should be assiduously observed (by the learned brāhmaṇas and others) so far as they are not in conflict with their duties (as laid down in their sacred books)²

Nārada (p. 158 v 2) says

Among heretics, among naigamas guilds, corporations groups and assemblages, the king must maintain the conventions (settled) among them in fortified places as well as in the open country also

Śreṇis are communities of persons of various castes carrying on one kind of trade or business, pīḡāḥ are communities of the same (i e. of persons of different castes) carrying on different kinds of trades, vṛttas are assemblages of kinsmen, relatives and cognates they are also

Saṁvid means a settled convention or usage and vyatikrama means transgression So saṁvidvyatikrama is another name of samayasānapākaṁsa Manu (VIII 6) and Yāj. employ the title saṁvid-vyatikrama while Bṛ employs the word samayātikrama

Heretics are Bauddhas and Jains who deny the authority of the Vedas. Naigama ordinarily means a trader Kātyāyana as quoted in V R. (p. 608) defines ' naigama as a group of citizens The Mit. on Yāj. (II. 129) explains naigama as Pāśūpata and others who regard the Vedas as authoritative (here the word is derived from naigama meaning Veda)

1 Ap. Dh. 8 II 10. 26. 10, Manu VII. 133 exempt a learned brāhmaṇa from taxation and Manu VII. 135 calls upon a king to assign means of livelihood to *śreṇiyas*.

2. Aparāṁka and Sm. C. give examples of conventional rules Vide notes to V M p. 390. Some examples are old *prapids* and temples should be repaired, poor people should be supported when there is trouble from thieves, one man from each house should come forward for defence &c In the Peheva inscription from the temple of Garibnath (I. p. Ind. Vol. I, p. 184) we find that pious horse-dealers at Peheva agreed to impose upon themselves and their customers certain tithes, the proceeds of which were to be distributed among certain temples and priests. As examples of rules by the king are mentioned horses should not be sent to the enemy's country food should be given to all travellers

termed 'kulas'; 'pākhaṇḍins' and 'naigamas' have* been already explained.¹ 'Gaṇas' are the assemblages of these beginning with heretics and ending with 'vrātas'. Yājñavalkya (II 187) prescribes a punishment for breaches of the conventions (settled) among these

Him who embezzles the property of a gaṇa or who violates their established usages, the king should banish from the country after confiscating all his property ²

Here ends (the section on) the violation of conventions.

Now begins (the section on) rescission of purchase.

Nārada (p. 149 v 1) says :

When a purchaser, after having purchased an article for a (certain) price, does not approve of it (i. e. repents of the purchase), it is termed rescission of purchase, which is a title of law.

The same author (Nārada p. 150 vv. 5-6) fixes the time for examining an article (i. e. for buying an article on approval)

One should examine milch cattle within three days (from purchase), beasts of burden for five days and the examination of pearls, diamonds and corals may extend up to seven days. (The examination) of male bipeds (i. e. male slaves) may extend to half a month and twice that (i. e. for a month) in the case of a female (slave), of all kinds of seeds for ten days and for one day in the case of iron and clothes.³

Kātyāyana says .

The rescission (lit. repentance) in the case of land extends to ten days for the purchaser or for the seller.

Bṛhaspati (p. 350 v. 6) says

If some defect in any way is found (by examination) in the article before these (periods elapse), the article should be returned to the seller and the buyer should obtain the price thereof.

¶ Kātyāyana says :

If an article were purchased without being examined and was after-

1 Vide p 5 n 1 above for śreni, pūga and kula. Kātyāyana (vv. 678-680) defines the terms mentioned in this verse of Nārada 'Pūga' is variously explained Mayūkha gives one explanation Kāt explains it as 'companies of traders' Vir explains it as 'horse riders and elephant riders'. Kāt. explains 'vrāta' as meaning 'troops of soldiers armed with various weapons' and 'gaṇa' as an assembly of brāhmanas' Vide notes to V. M. p. 386 for examples of conventions prevalent among heretics &c

2 This punishment was to be awarded for serious offences, but for light ones Manu (VIII. 220) prescribed a fine of four suvarṇas or six niskas &c.

3. Compare Yāj. II 177 These rules can apply only if the thing was purchased without examination.

* P. 216 (text). ¶ P. 217 (text),

wards shown to be defective the article should be returned to its owner within the time (limited by the *śāstras*) but not otherwise.

With regard to an article bought after an examination by (the purchaser) himself Nārada (pp 149 150 vv 2-3) says

Where a purchaser after purchasing an article for a price thinks that he has made a bad purchase, it should be returned (by him) to the seller the same day without looking into it (i e. without examining it)¹ If the purchaser were to return it on the second day he would forfeit (lit. bring) a thirtieth part of the price, if on the third day, double of that (i e. a fifteenth part), after that it (the article) belongs to the purchaser alone (i e. it cannot be returned)

Nārada (p 150 v 7) says

A worn garment which is dark and soiled when purchased with (knowledge of) all faults cannot be returned to the seller

Here ends (the section on) rescission of purchase

Now begins (the section on) non-delivery of sold chattel

Nārada (p 146 v 1) says

When an article has been sold for a (certain) price and is not delivered to the purchaser that is termed non-delivery of a sold chattel which is a title of law

* Yājñavalkya (II. 254) says

He who having received the price of an article does not at all deliver it to the buyer should be made to deliver it to the buyer together with interest and if (the purchaser) has come from a foreign country then together with the profit that he would have made in the foreign country

Dik means another country, 'diglābha' means the profit that would be made by sale in another country, 'sodayam' means 'together with interest' The same author (Yājñavalkya II 256) says

If an article suffer damage by an act of God or the king the loss will fall on the seller alone if he did not deliver it on demand

The same author (Yājñ II. 255) says

If loss (of the thing sold) arises through the fault of the purchaser, the loss falls on the purchaser alone.²

Nārada (p 148 v 9) says

When a purchaser, having purchased an article does not accept it when

1 The reading *avikratam* (in an undamaged condition) is much better

2. Compare section 107 of the Indian Contract Act.

P 218 (text)

it is delivered to him (by the vendor), the vendor incurs no blame (i e commits no wrong) by selling it to another

Yājñavalkya says

What was sold for an inadequate price by an intoxicated man or by one insane or by one who is dependent or idiotic must be given up (by the purchaser) and it would still belong to the vendor.¹

All these rules must be understood as referring to an undertaking given by the seller to the effect ' the article is to be delivered to you alone and to none else, when the price is paid ', since² Nārada (p 148 v. 10) says

Thus has the rule (or law) been declared with regard to goods for which the price has been paid. When the price has not been tendered, there is no transgression by the vendor,² unless there be a special agreement (to deliver in spite of no price being paid)

On the sale of an article with blemishes Yājñavalkya says ³

That clever man who, knowing his chattel to be full of defects, sells it should be made to pay double its price (to the purchaser) and a fine equal to that (i e double the price)

Here ends the (section on) non-delivery of a sold chattel.

Now begins (the section on) dispute between master and herdsman.

When cattle or the like are destroyed (or injured) through the fault of the herdsman, Yājñavalkya (II. 165) says

When the loss occurs through the fault of the herdsman, the fine ordained for him is twelve panas and a half and (he must give) to the owner also the animal⁴ (or its price).

' Dravyam ' means ' a cow and the like '. Manu (VIII 234) lays down the signs of ascertaining the death of cattle and the like.

1 This verse very closely resembles Br p. 350 v. 5. Some construe ' for an inadequate price ' as a separate cause for rescission

2 No fault attaches to the vendor if he retains the article or disposes of it to another when no price is paid unless he specially agreed that he would not do so, though the price be not paid at once.

3. This appears to be the same as Br. p. 350 v. 4 The verse in the text is not found in the printed Yāj and is ascribed to Br. by Sm G. and Vir Compare Yāj. II. 257 and Nārada p 148 v. 7.

4. ' Sārdhatrayodas'a ' is rendered as 13½ by the Mit, Aparārka and Smṛticandrikā, while the Vir and Par M take it to mean 12½. The Vir relies upon a Vārtika to Pāṇini II 1 94 and the usage of the Mahābhāṣya. Vide 'notes to V M p. 392. Nilakanṭha seems to hold that a similar animal should be restored to the owner.

* P. 213 (text)

When animals die let (the herdsman) present to the master in order to show (him) the signs (for recognising his deceased cattle) the ears, their hides their tails, the abdomen (or bladder) the tendons, the pigment (found in their heads &c)

Madana says that *anikaḥ* means the horns and the like *Yājñavalkya* (II 167) describes the portion of ground (to be set apart) as pasturage for cows and the like

* A vacant space (for grazing cattle) of one hundred bows should be left between one village and another two hundred bows in the case of a large-sized village and four hundred bows in the case of a town ¹

¹ *Parīṇikhaḥ* means land set apart for pasture for kine and the like. This *parīṇikha* is the same as *parīhāra* since *Manu* (VIII. 237) says round about a village an enclosure should be kept of one hundred bows a *kāraṇa* is a village having several artificers and husbandmen, some say it means ' a village abounding in thorny shrubs ' ² *Yājñavalkya* (II 159-161) describes the fine to be paid by the owner of beasts when they eat the growing crop or the like belonging to another

(The owner of) a she-buffalo doing damage to crops should be fined eight *māṣas* half of that (the owner of) a cow (should be fined) half of that (i. e. two *māṣas*) (the owner of) goats and sheep. For cattle sitting down in the field after eating the crops the fine is double of that already stated. The same fine is to be levied in the case of enclosures (in which grass is stored) asses and camels are equal to she-buffalo (as regards fine) As much crop as may be destroyed (by straying animals) shall be made good to the owner of the field the herdsman (if at fault) shall be whipped but the owner of the cattle incurs the fine already stated

† *Vivitam* means a place for storing grass, wood and the like *Uśanas* states an exception to the above :

(Owners of) cows are not to be fined during festivals (if they stray) and at the time for *śrāddha*.

Vyāsa says

O best of men what was enjoyed by *brāhmanas* after committing a trespass, by very indigent relations or by cows excels the *Vājapeya* ³ (in merit)

Uśanas says

1. The reading of the printed text is *grāmakṣetrāntaram* (which means between a village and the fields). A bow was often taken as equal to four cubits. Vide p. 63 for various lengths of a bow

2. This is the explanation given by the *Mit.* The *Mayūkhya* follows the *Madanaratna*

3. *Vājapeya* is one of the seven soma sacrifices. Vide *Gautama* VII. 21.

p. 220 (text) : p. 221 (text)

Noither the *pitrs* nor the gods taste (the offerings) of that man who demands back the corn destroyed by cows¹

Thus ends the (section on) dispute between master and herdsman.

Now begins (the section on) boundary disputes.

Brhaspati (p. 351 vv 5-6) states the means wheroby boundaries may be ascertained

Dry cowdung, bones, chaff, charcoal, gravel, pieces of stones hollowed out, sand, bricks, cow's tails, cotton seeds, ashes—after having put these things in jars one should deposit them underground at the ends of boundaries.²

Yājñavalkya (II. 152) states some special rules about witnesses in this matter :

Or men from neighbouring villages, even in number, either four, eight or ten, wearing red garments and garlands of red flowers and carrying on their heads clods of earth, should trace (or point out) the boundary.³

Nārada (p. 157 v. 9) says

One man⁴ single-handed should not settle the boundary, even though he be confident (about his knowledge of the boundary). This decision (about a boundary) must be entrusted to many, since it is an affair of importance

* Brhaspati (p. 352 v 11) says

In the absence of witnesses and signs (of boundaries) even a single upright man acceptable to both (disputants), wearing a garland of red flowers and a red garment and carrying a clod of earth on his head, adhering to truth and having kept a fast, may fix the boundary

1. The Vir.(p 451)is careful to add that this applies to cows only at the time of s'rāddha

2 The marks of boundaries are either patent (prakāś'a) or concealed (upāms'u) Vide Manu VIII 249 Wells, tanks, large trees, gardens, temples, mounds, beds of rivers—these are (Br p 351 v. 3) visible signs and the verses in the text give the invisible ones. Compare Manu VIII 250-251 for a similar enumeration.

3. The boundary was to be settled by the evidence of witnesses properly so called (a witness would be one who actually saw the boundary laid out) Vide Manu VIII. 253. This verse says that in the absence of witnesses, *sāmantas* should settle it. 'Sāmantāḥ samagrāmāḥ' is explained by Mit as 'neighbouring villagers even in number'. The words 'four, eight, ten' indicate according to Aparārka that two or six will not do, the Mit. does not support this view Vide Manu VIII. 258 about *sāmantas* being four and VIII. 256 about red garments and garlands.

4 Dr. Jolly translates 'pratyayavān-api' as 'even though he be a reliable person.' This is not correct The Mit. says that this verse applies where the single man is not accepted by both parties as an arbiter

* P. 222(text).

Kātyāyana says

In the case of settling the boundary by walking, in the ordeal by *kos'a* (sacred water of the bath of idols &c) in swearing by the feet of (idols elders or brāhmanas) (the visitation of) divine or royal displeasure is to be expected within three fortnights, one fortnight and a week respectively ¹

Manu (VIII 257) says

The truthful witnesses who point out the true boundary in aforesaid manner are absolved from sin but such as settle it falsely should each be fined two hundred (paṇas)

Nārada (p 156 v 7) says

If the neighbours speak what is not true in settling a boundary they should all be separately fined by the king the middle amercement.

Kātyāyana says

Of the several persons gathered together (for settling a boundary) if all of them do not (properly help to) decide either through fear or covetousness they should (each) be made to pay the highest amercement.

Yājñavalkya (II 153) says

In the absence of persons knowing the boundary or marks (indicating it) the king is to settle the boundary (as he thought fit) ²

* Manu (VIII 265) says

When the boundary cannot be ascertained the king knowing the law, should himself assign the (disputed strip of) land to that one party to whom it would be most serviceable This is the settled rule ³

The same author says

One should not disturb a man in the manner and extent of the enjoyment of a house, (of access through) a door or of a market and the like which he had from the time of its foundation. ⁴

Kātyāyana also says

One should not interfere with (another's) base of the wall, drain balcony window watercourse and dwelling house he who obstructs would be liable to fine

Mekhala means the built base of a wall (i. e. the plinth)
bhramah means passage for the exit of water Nipkāsah according

1 The idea is that the boundary was not to be regarded as final for three fortnights. If within that time the person or persons settling it were visited with divine or royal displeasure, then it was to be held that they decided falsely.

2. Under the Bombay Land Revenue Code (Bombay Act V of 1879) section 121 the Collector's decision as to the boundary between two survey numbers is final.

3. Aśvabhāṣyam is variously explained Aparīkṣa, Sm C. and Vir explain as devoid of witnesses and marks. Kullūka and Vir as impossible to ascertain.

4 This is not found in Manu but in Bṛhaspati p 351 v 24 where vāri (water) is read for dvāra.

to Madana, means a place for sitting down constructed of wood projecting from a mansion and the like, but not touching (resting on) the ground. In some books the reading is ' dhūma-niskāśah ', the meaning of which is ' a window or the like for letting out smoke ' By the word ' ādi ' (in the verse preceding Kātyāyana's) are intended the walls of others and the like The same author (Kātyāyana says) :

After the time of the first entry (or foundation) such things are not to be added at any time ; one should not open a window so as to have a peep into the dwelling houses of others or construct a drain for rainwater on to the house of another ¹

Brhaspati (p 354 v 26) says :

A privy, a fire-place, a pit, a receptacle for throwing in leavings of food and dirty water—these should never be constructed very close to the wall of another.

* ' Vācāh-sthānam ' means ' a privy ' ; ' atyārāt ' means ' very near ' .
Kātyāyana says :

Places for depositing ordure, urine or (soiled) water, the construction of a fireplace or pit should be made leaving (at least a space of) two hands from the wall of another

Brhaspati (p 354 v. 27) says :

A path by which men and beasts go to and fro unhindered is declared to be ' samsaraṇa ' and must not be obstructed by anyone.

Nārada (p 158 v 15) says :

One should not obstruct a cross-road, the sanctuary of a deity, a king's highway by (heaping) ordure, by a raised platform, a pit, aqueduct or the eaves of houses.

Kātyāyana says .

That is called a cross-road (or thoroughfare) by which all men pass at any time without being prevented and that is called a rājamārga (a king's highway) by which all men pass at stated times

Brhaspati (p. 354 v 28) says .

He who makes obstruction on a thoroughfare (by keeping carts &c), or makes a pit, or plants trees or voids ordure wilfully shall pay one māśaka as fine

Manu (IX. 282) says :

He who voids ordure on the king's highway when there is no calamity (or urgent pressure) should pay (as fine) two kārśāpanas and should immediately remove the filth ²

1 ' To have a peep into ' &c —This speaks of the right of privacy which is recognised by custom even now in Gujerat Vide *Nathubhai v Chhaganlal* 2 Bom L R. 454, *Manch-lal v. Mohanlal* 44 Bom 496 (=22 Bom L R. 226) These are not to be added so as to interfere with another's rights

2 Great leniency was shown to old men, pregnant women and minors. Vide Manu IX, 288

* P. 224 (text).

*Kātyāyana says:

He who defiles with filth a tank a garden or holy water should be fined the first amercement after making him remove the filth

Yājñavalkya (II 166) says

For destroying boundary, for encroaching beyond the boundary and for usurping a field the fines (respectively) are the lowest, the highest the middling.

Manu (VIII 264) says

One who usurps by intimidation a house a tank, a garden or a field should be fined 500 (paṇas) but the fine is two hundred if he did it through ignorance.

Kātyāyana says

The fruits and flowers of trees growing on the boundary between two fields should be declared as joint between the owners of the fields.

Kātyāyana says

But where the branches of trees growing in one man's field are spread over another's field he should be considered as the owner in whose field the (branches) stand spread out.¹

Yājñavalkya (II 167) says

When a man without informing the owner of a field makes a water-course in that field the owner (of the field in which the *setu* is made) is entitled to the profit arising therefrom or in his absence the king.²

*The same author (Yājñ. II 166) says

A dike that produces benefit should not be forbidden because it causes some slight injury as also a well which occupies little space but has abundant water (should not be prohibited) because it deprives another of some land.

Na nīṣedhyah (should not be prohibited) has to be understood (after kūrpaḥ)

Nārada (p 168 v 17) also says:

(The erection of a) dike in the middle of another man's field is not forbidden if it confers great benefit while the loss is trifling large increase (of crops) is desirable even if there be (slight) loss (of land)

Nārada (p 169 v 20) says

If a man were to repair (start afresh) a dike erected in former times

1. Kātyāyana draws a distinction between *śākhā* and *śaśthitāṣṭhā*. Therefore it is proper to understand after *śaśthitāṣṭhā* in the fourth quarter the word a *śākhā*. Mandlik (p. 186) translates in whose field the trees stand But this is not correct. The reference is to the fruits and flowers growing on such branches.

2. *Setu* does not mean bridge here, but a dike or watercourse. A *setu* is of two kinds, one *lāṣṭa* (which is dug into the ground) and the other is *bandhṣṭa* (which prevents the access of water) Vide Nārada p. 168 v 16. The purport of the verse is that a *setu* should not be made in another's land without his permission or without giving him some consideration.

but which had become dilapidated, without the permission of the owner, he shall not have the (use and) profit thereof.

Vyāsa says ;

He who having taken a field does not himself cultivate it nor causes it to be cultivated by another should be made to pay to the owner of the land its produce and a fine equal in value to the king¹

'S'adam' means 'as much crop as it was possible to raise from the field.'

Here (ends the section) on boundary disputes.

Now (begins the section on) Abuse.

*Brhaspati (p 355 vv. 2-4.) says :

That is said to be abuse of the lowest degree when the country, village, the family or the like of a man is abused or sinfulness is ascribed (to a man) without specifying any definite act (or object).² Speaking of one's (the abuser's) connection with the sister or mother (of the abused), or ascription of minor sins (to the abused), is termed abuse of the middling sort by those who are learned in the S'āstras.³ Charging a man with taking forbidden food or drink, or taxing him with (the commission of) mortal sins, mercilessly exposing a man's weakest point—this is termed abuse of the highest degree⁴

'Dravyam vinā' (in the first verse) means 'without specifying any definite object,' that is, it is merely a verbal abuse, 'abhighattanam' means 'exposing' (or divulging) Viṣṇu (Dh S V. 35) says 'For abuse of one of the same class (as the abuser) a man should be fined twelve paṇas.' In another smṛti it is said :

When two parties have been guilty of abuse (insult) and both have begun (to quarrel or abuse) at the same time, both shall undergo the same punishment, if no differentiation is apparent (in respect of their culpability).⁵

Nārada (p. 208 v. 9) says :

He who is the first to offer an insult is decidedly to blame ; he who returns the insult is also a wrong-doer ; but the one who is the first (i e. who began) shall undergo the heavier punishment⁶

1. Compare Yāj. II 158.

2. Compare Nārada p. 207 v 1.

3 Vide Manu XI. 59-66 and Viṣṇu chap. 37 for upapātakas

4. For mahāpātakas vide Manu XI. 54

5. This is Nārada p 208 v. 8.

6. 'Āksārayet' means 'one who falsely charges with the commission of a sin,'

* P, 227 (text).

Manu (VIII 267) says

One defaming (or abusing) a brāhmaṇa shall incur the fine of a hundred paṇas if he be a kṣatriya, if a vaiśya a hundred and fifty or two hundred but if a śūdra he shall be liable to corporal punishment¹

*Bṛhaspati (p 366 v 7) says

For a brāhmaṇa abusing a kṣatriya the fine is fifty for abusing a vaiśya half of fifty (i.e. twenty five) for abusing a śūdra twelve and a half²

The same author (Bṛhaspati p. 366 v 12) says with reference to a śūdra :

(A śūdra) giving instruction as to the peculiar duties (of the classes &c.) loudly uttering the Veda or reviling brāhmaṇas is punished by cutting out his tongue³

Manu (VIII 275) says

A man accusing his mother father wife (elder) brother father-in-law and preceptor (of sin) shall be made to pay a fine of one hundred paṇas, as also he who does not make way for his preceptor

Bhrātā means the elder one since the word is in association with the father and other (venerable persons) In the Mīṭākṣarā and other works it is said that (this punishment is incurred) in the case of the mother and the rest (even though) they be guilty (of the sin charged) and in the case of the wife (only) if she be innocent Yājñavalkya (II 208-209) says

For a verbal threat of injuring the arms, the neck the eyes or thigh, the fine shall be a hundred and a half of it in the case of the foot nose, ear hand or the like When however a feeble man speaks thus he should be fined ten paṇas so one who is unable (to carry out his words into execution) should be made to furnish a surety for the safety of the other

†The same author (Yāj II 205 211) says

The king shall compel a man to pay a fine of twenty five paṇas who abuses another by saying I shall have carnal intercourse with your sister or mother For abuse of brāhmaṇas learned in the three Vedas, of the king and of gods the fine is the highest amercement.

Nārada (p. 210 v 21) says

One who calls an outcast an outcast or a thief a thief is equally criminal (with those whom he charges) on account of the texts to that

1 'Vadha is frequently used in the sense of corporal punishment. Vide Manu VIII 129 where we have *dhāvadadṛḍḍa* and *radhadadṛḍḍa*. Mandlik translates *vadha* by death here. But this is too drastic a sentence, since Manu VIII. 270 prescribes only cutting the tongue. Vide also Bṛhaspati a little below

2. Compare Gautama XII. 8-10. As each succeeding fine is half of each preceding it is better to take 'ardhatrayodas' as $12\frac{1}{2}$ and not $18\frac{1}{2}$ (in spite of the Mtl. on Yāj. II 201)
Vide text P 210 'ardhatrayodas'apagāh and note thereon above.

3. Compare Gautama XII 4 Āp. Dh 8 II 10, 27 14

P 223 (text). † P 227 (text)

effect; but (if he reproaches them) falsely he is twice as guilty (as they would be).¹

Yājñavalkya (II 204) says :

He who by true, untrue or ironical statements ridicules persons wanting in a limb or organ of sense or diseased persons, should be fined twelve panas and a half

Uśanas says :

For him who pleads 'such a thing was said by me from ignorance, carelessness, envy or friendship; I shall not say so again' (the king) should prescribe half (the ordinary) fine

Here ends (the section on) abuse

Now begins (the section on) assault.

Nārada (p. 207 v 4) says

Hurting the limbs of another with the hand, foot, weapon or otherwise or defiling a man with ashes (or other impure substances) is termed assault

*Bṛhaspati (p 357 v 4) says :

He who having been abused returns the abuse or having been beaten returns the blow or strikes an offender down commits no wrong²

Kātyāyana says :

Bhṛgu has ordained that the highest fine shall be inflicted for cutting off the ear, nose, foot, eye, the tongue, the penis or hand; and the middling one for injuring (or wounding) any one of them.

Yājñavalkya (II 213-214) says .

For throwing ashes, mud or dust the fine is declared to be ten panas; and double that amount for assaulting a man with an impure thing or with the heels or with spittle This is so as regards offenders of the same class with (those whom they offend), (for offences) against the wives of others (of whatever caste) or against one of a higher caste (than the offender) the fine is double (of the above). The fine is half

1, ' Vacanāt ' may also mean ' even if he only says what is true. ' The mere truth of an imputation was no defence in a charge for defamation Vide exception one to sec 499 of the Indian Penal Code, which requires that the imputation be made for the public good. Compare Manu VIII 274 Kātyāyana (verse 176) lays down that if a man were called ' patita ' in order that others should avoid contact with him, there was no punishment.

2 Br (p 359 verse 13) has another verse, which is similar to Nārada's quoted under ' abuse ' This verse does not conflict with them It states the right of private defence and also means to convey that the man who returns an abuse or a blow is not equally guilty with him who starts the affair.

* P. 280 (text).

(of above) if the offence be against persons of lower class (than the offender) (For acts committed) through ignorance intoxication or the like there shall be no fine¹

¹ Pāṇḍip means the blind part of the foot Kātyāyana says

The fine shall be raised to fourfold when (assault is committed) with vomited matter urine or ordure and the like sixfold if (these are thrown) on the middle of the body and eightfold if thrown on the head

Yājñavalkya (II 216) says

When the hand and foot are (only) raised up (to strike) the fine is respectively ten and twenty paṇas. For threatening each other with a weapon, the middle amercement is prescribed for all castes

²The same author (Yā; II 217 218) says

For violently pulling the foot hair garment or hand the fine is ten paṇas the fine is one hundred for violently pulling a man after covering him with a garment and tightly tying him with it and then trampling him under the feet A man who causes pain with a stick or the like and also causes blood (to come out) should be fined thirty-two paṇas, double that sum when blood is seen (to come out)³

The meaning of pida etc is for covering with a garment, tightly tying (or dragging) and trampling under feet (the fine) is one hundred

The same author (Yā; II 219 216) says

The middling fine (is prescribed) for breaking a hand foot or tooth, for tearing (or piercing) the ear or nose, for opening up a sore (that was healed up) for so severely beating a man as to leave him almost dead. The limb with which any one not a brāhmana causes pain or injury to a brāhmana should be cut off When (a weapon or stick) is raised for striking (a brāhmana) the first amercement (should be awarded) and half of it if the weapon was only touched (and not raised)

Manu (VIII. 279-280) says

With whatever limb a man of the lowest caste (i.e. a vīdra) strikes one of a higher class that very limb of his should be cut off this is the ordinance of Manu If (a vīdra) raises his hand or a stick (for striking one of a higher class) he is liable to have his hand cut off

Kātyāyana says

Just as different fines have been prescribed for abuse according to the direct or reverse order (of classes) so also for assault (different) fines should be inflicted according to the order (of the classes)

1 The Mlt. takes uttamam to mean more learned and better in character than the offender

2. The reading s opitena samam, though of almost all mss., is bad, as it conflicts with the fourth quarter of the verse Mlt. and Aparīkha read s opitena vink (without shedding blood) which makes good sense,

P 231 (text)

* Visnu (V. 73) says 'when several simultaneously strike down one man, the fine for every one of them shall be double of that declared' (where a single man strikes another).¹ Kātyāyana says:

For injury to the organs of the body just as a fine is to be imposed (by the king), so also something must be given for appeasing the man (injured) and also for curing him (as may be fixed) by experts²

'Tustikāram' means 'what would satisfy the man beaten'; 'samut-thānam' means 'the price of drugs etc.'; 'abhiññāh' means 'by experts', the meaning being 'what may be fixed by experts should be paid.' Yājñavalkya (II. 225-226) says as to striking beasts:

For beating, shedding blood and for cutting off the horns and the limbs of minor beasts (like goats, sheep and deer) the fine shall be from two paṇas (upwards),³ for cutting off their organs of generation and for causing (their) death the middle amercement (shall be inflicted) and the price (of the beast be paid to the owner) The fine is double for these (offences of beating, shedding blood and etc.) in the case of large animals (like bullocks, horses and etc.).

In respect of damage to trees Manu (VIII. 285) says:

The settled rule is that a fine must be inflicted (for injuring trees) according to the usefulness of the several kinds of trees.⁴

Thus ends (the section on) assault.

Now begins (the section on) theft.

Nārada (pp 204-5 vv. 14-16) speaks of three kinds of chattels as being useful (in the treatment) of theft.

Earthenware, a seat, a couch, bone, wood, leather, grass and the like, leguminous corn (like māsa, mudga), cooked food—these are termed articles of small value. Clothes made of materials other than silk, beasts other than cows, metals other than gold, rice and barley (these are declared to be of) middling value; ‡gold, precious stones, silk, women and men (slaves),

1. Compare Yāj II 221 for almost the same words.

2. Compare Yāj. II 222 and Br (p 358 v 10)

3. This means according to Aparārka two paṇas for beating, four for drawing blood, eight for cutting off horns, 16 for cutting off a limb, while the Mit says that it is respectively 2, 4, 6, 8

4. Compare Visnu Dh S V 55-59 Those who destroyed trees had to pay the price, also to the owner Vide Yāj. II 228 for higher fine for cutting trees growing near temples and boundaries.

* P. 282 (text). ‡ P. 293 (text).

cows, elephants and horses, and what belongs to a god a brāhmaṇa or a king—these are regarded as articles of high value¹

Here the same author describes open thieves

Traders quacks, gamblers, (corruptible) assessors (and judges) those who accept bribes cheats those who (profess to) foretell and interpret portents and fortune, *naucā* girls (or prostitutes) those who sell imitations (such as imitation pearls and jewels) (hired servants) refusing to do their work, those who profess to arbitrate (and make money by favouring one side) false witnesses, so also jugglers—these are open thieves²

Similarly in another *smṛti* (Nārada p. 223 vv 2-3) it is said

Open thieves are those who employ false measures and balances (i.e. weights) receivers of bribes, those who are full of tricks, impostors, women of ill repute (prostitutes) those who manufacture imitations those who make their livelihood by declaring how a person may bring about his welfare (i.e. who sell *amulets* etc.)—these and such like persons are considered open thieves in this world³

Brhaspati (pp. 860—vv 7 15) says :

A merchant who sells articles after concealing their blemishes or after mixing (good and bad ones together) or sells (old articles as new) after repairing them should be made to pay double (the price of) the goods (to the purchaser) and an equal fine (to the king)⁴

*That physician who, though unacquainted with drugs and spells and also ignorant of the true nature of a disease yet takes money from the sick shall be punished like a thief. Gamblers playing with false dice, *naucā* girls those who appropriate to themselves the king's taxes, astrologers and cheats—these rogues are declared to be liable to fine. Assessors pronouncing an unjust decision also those who live by taking bribes, those who deceive people that put trust in them—all these should be banished (from the country) Those who without knowing the lore of stars or portents, yet expound omens to people should be sodalously punished. Those who, endowing themselves with staff and deer's skin, show themselves off to people (as ascetics) and harm mankind in this disguise should be corporally punished by the

1. Yāj. II, 275 alludes to these three classes of movables, the subjects of theft.

2. These *varcas* are Br p. 800, vv 3-4. Manu (IX 250-257) divides thieves into two classes, *prākāśa* (open) and *aprākāśa* (concealed) or *prachanna*. *Akṛyākrīpā* may also mean those who set up evidence that is no evidence.

3. Dr Jolly translates '*pratirūpakāśa*' as those who walk in disguise but that is doubtful. He translates *maṅgalāśāśa-vṛttayāśa* as those who live by teaching the performance of auspicious ceremonies. Compare Manu IV. 238-240 for open thieves.

4. An equal fine may mean equal to the price or it may mean equal to the double that is to be paid to the purchaser.

5. Vide *Bandhavyāsa Dh.* S. II 10 12 and Manu VI 53 for staff and deer-skin being two of the peculiar marks of a sannyāsin.

P 231 (text).

king's officers. Those who, by repairing and polishing articles of small value, make them appear as of great value and deceive the ignorant should be fined in proportion to the gain (made by them). Those who make false gold, false jewels, false coral and the like should be made to return to the purchaser the price and to the king a fine double (of the price of the article they professed to sell). If arbitrators cheat (either party) through friendship or covetousness or the like motive and if witnesses give false evidence, they should be made to pay a fine double (of the claim).

*Vyāsa says

Those, who stealthily move about at night, furnished with tools (for robbery) and whose places of residence are not known, should be known as secret thieves.

The same author (Vyāsa) says

A pick-pocket, a house-breaker, a highway robber, a cut-purse, he who steals women, men, cows, horses and other animals—these are declared to be nine kinds of thieves¹

'Sandhi' means 'the joint of a wall and the like' Yājñavalkya (II. 274) says:

The pickpocket and the cutpurse should be deprived of their two fingers (viz. the thumb and the index finger), for the second offence they should be deprived of the hand and the foot²

'Sāndams'ah' means 'the thumb and the forefinger.' Manu (IX. 276) says.

The king should cut off the hands of those robbers who having made a hole in a wall commit a theft at night and should impale them on a sharp stake

Brhaspati (p. 362 v. 17) says:

So highway robbers should be bound and should be hanged by the neck from a tree. The king should cut off the fingers of a cut-purse when he is caught for the first time, his hands and feet (when caught) a second time and he deserves death (when caught) a third time³

Angulī means 'the forefinger and the thumb.'

Nārada (p. 225 vv. 16-17) states a special rule when the thief runs away taking the booty with him:

1. 'He who steals animals'—this contains five kinds of thieves.

2. 'Sāndams'ah' means 'tongs'. The Mit explains that the pickpocket's hand should be cut off and the tong-like two fingers of the cutpurse should be cut off. For repeating the offence, one hand and one foot was to be cut off, according to V. R. As they found the two fingers most useful in theft they were to be deprived of them.

3. This last verse is Manu IX. 277. On account of Yāj. II. 274 the fingers meant here are the forefinger and the thumb though the plural 'angulīḥ' is used in Manu. The Mayūkha seems to have read 'angulī granthibhedasya.'

* P. 285 (text)

*In whosoever land (range or jurisdiction) a theft takes place should try to catch the thief or he should be made to pay (the price of) the thing stolen, if the footmarks have not gone out from that land or range) When the footmarks (of the thief) are not seen anywhere else after leaving the place (where the theft was committed) the king should make neighbours, the guardians of the roads (marahes) and the governors of the district pay (for the stolen goods)

Yājñavalkya (II. 272) also says :

The village shall pay (the price of stolen goods) when the theft took place within its own borders (provided footmarks are not found to go out of the village) or (that village should pay) to which the footmarks (of the thief) are traced if (theft committed) beyond one *krośa* from the village, then the five (surrounding villages) or ten villages should pay¹

On the point of kidnapping women Vyāsa says

The kidnapper of a woman shall be burnt on an iron bedstead with a fire of grass (or weeds) The kidnapper of a man should have his hand and foot cut off and be exposed in a thoroughfare²

Bṛhaspati (p. 382 v 19) says

A cow-stealer shall have his nose cut off and shall be plunged into water after being bound

Nārada (p. 227 v 28) says³

If a man kidnapped a married woman his whole wealth (was to be confiscated by the king) but if he kidnapped a maiden he should be killed For a theft of horses elephants and metals, the king should take (the whole wealth) this is the view of Bṛhaspati.

The word *sarvasyam* is to be repeated (in the second half verse)
Vyāsa says

Of a thief of cattle half the foot should be cut off with a sharp weapon
‡ Nārada (p. 227 v 29) says

On him who steals a large animal (elephant, horse &c.) the highest fine shall be inflicted the middling on him who steals an animal of middle size and the first for theft of minor animals

Manu (VIII 320) says

On him who steals more than ten *kumbhas* of corn corporal punishment shall be inflicted In other cases (i e theft of one to ten *kumbhas* of corn) he should be fined eleven times as much (as the price of stolen

1. V R. explains village as headman of the village while Mit. explains it as villagers.

2. Compare Br p. 302 v 18

3. Nārada has only the first half Compare Manu VIII 323. The conflict about punishments between various smṛtis is due to considerations of the castes of the thieves, their being poor or well-off and the worth of the object stolen. So says V R.

P 226 (text) ‡ P 227 (text).

corn) and shall pay (to the owner) the price (of stolen corn) ¹

'A kumbha' is equal to twenty *prasthas*. The same author (Manu VIII. 323) says :

For stealing the principal among precious stones (the thief) deserves corporal punishment.²

Nārada (p. 227 v. 27 = Manu VIII. 321) says

For stealing more than one hundred *palas* of gold, silver and the like or for stealing the finest clothes or all precious gems corporal punishment (shall be inflicted).

Manu (VIII 321-322) says .

The cutting of the hand is approved (as the punishment) for the theft of more than fifty *palas* of gold, silver and the like or of the finest clothes; for stealing less (than fifty *palas*) the king should impose a fine eleven times as much as the price (of the stolen thing).

Yāj. (II 270) says :

A brāhmana (guilty of theft) should be branded and banished from the kingdom ³

*Manu (IX. 240) says .

The first (three) classes, if they undergo (the proper) penance (for theft), were not to be branded on the forehead by the king but were to be made to pay the highest amercement ⁴

Yājñavalkya (II 270) also says

The king should make the thief restore the thing stolen (or its price) and should inflict on him various kinds of corporal punishment.

Nārada (p 205 v. 19) says

Those also who give food and shelter to thieves who run about (to avoid punishment) and those who being able (to arrest them) allow them to escape incur the guilt of thieves.⁵

And they are also liable to the same penalty.

Here ends (the section on) theft and robbery

1. Kumbha was a very large measure of corn about the exact extent of which there was great divergence of opinion Vide notes to V M p 412 The Mit. says that a kumbha was equal to 20 *dronas*, while Aparārka says it is equal to two *dronas* The V R says it is equal to twenty *prasthas* Mayūkha follows this According to some, twelve *prasthas* made a *kudava*, 4 *kudavas* made a *prastha*

2. Kullūka explains that 'vadha' may consist in flogging, mutilation or even capital punishment according to the status of the person robbed and the robber

3 The mark to be branded was a dog's foot. Vide Manu IX 287. Vide next verse also.

4. For *prāyas'cittas* for theft vide Manu XI 162--168 and Yāj III, 257--258. The text of Manu has 'sarvavarnāḥ' (all classes)

5. Compare Manu IX. 278 and Yāj. II 276,

* P. 238 (text).

Now begins (the section on) heinous offences

Nārada (p.202 v 1) says about the nature of *sāhasa*

7

Whatever act is performed by force by those who are puffed up with (the pride of) strength is called *sāhasa* (a heinous offence), *sāhas* here means strength ¹

Bṛhaspati (p. 359 v 1) says

Homicide theft assault on another man's wife and the two kinds of *pāruṣya* (viz. abuse and assault)—these are the four kinds of *sāhasa*

* Ubhayam means both abuse and assault Nārada (p. 203 vv 4-6) says

Destroying fruits roots, water and the like and implements of husbandry throwing away or reviling them and trampling upon them—this is declared to be *sāhasa* of the first degree destroying &c. clothes, cattle food or drink or household utensils is declared to be middling *sāhasa* taking human life by poison weapons or other means, assault on the wife of another and whatever else endangers human life is called *sāhasa* of the highest degree

Yājñavalkya (II. 273) says

The king shall cause to be impaled on stakes those who make others captive those who (forcibly) carry away horses and elephants and who kill others by force

Bṛhaspati (p. 363 v 30) says

Those who are openly murderers and those who are secret assassins shall be put to death by the king by various modes of execution after finding them out and after confiscating their property

The same author (Bṛhaspati p. 363 v 31) says

Where several persons in anger beat a single individual (and kill him) that man is declared to be the murderer (and suffers the punishment for murder) who strikes (the victim) on a vital part (i.e. who gives the fatal blow).

† Kātyāyana says

One who commences a *sāhasa*, or aids it, or who gives instructions as to the way (in which it may be committed) who gives asylum or furnishes weapons or food to evil-doers who advises fighting who incites to the destruction of the person (killed) who connives (at the commission of an offence) who speaks ill (of the person killed &c) who approves (of the offender's act) who though able (to prevent an offence) does not forbid it—all these are (practically) perpetrators of the deed (The king) should prescribe for them suitable punishments according to the capacity

1. *Steya* must be distinguished from *sāhasa*. In the former there is no use of force or threat of using it; in *sāhasa* there is use of force or threat of the use of it.

of each offender.¹

Nārada (pp. 203-204 vv. 9-10) states a special rule as to the punishment of brāhmanas

This is the law of punishment ordained for all (classes) without distinction, save only corporal punishment in the case of a brāhmana (offender). A brāhmana (offender) is not liable to corporal punishment (such as mutilation, death). The punishment for him (brāhmana offender) is shaving of the head, banishment from the city, branding him on the forehead with the mark appropriate to the crime and marching him (through the streets) on an ass.²

A brāhmana, even though an *ātātāyin* (a felon or desperate character) was not to be killed, since Sumantu says ' there is no sin in putting to death an *ātātāyin*, except cows and a brāhmana.'³ Kātyāyana says

According to Bhṛgu there shall be no (punishment of) death in the case of a felon, who belongs to the highest class and who is endowed with austerities and study of the Vedas and that (the punishment of) death (is prescribed) for a sinner of a lower class (than a brāhmana).

*The same author says .

He who makes ready a sword, poison or fire (for perpetrating a crime), also one who raises his hand for an imprecation, who kills by the (recitation of) incantations contained in the Atharvaveda, who is an informer of the king (whereby another man may lose his life), who assaults (or violates) another's wife, who is intent on picking out the weakest points (of others)—all these and the like should be known as *ātātāyins*⁴ Vasistha (III 16) also says

An incendiary, a poisoner, one armed with a weapon, one who robs another of his wealth, one who snatches away another's field and wife—these six are *ātātāyins*.

As to what Manu (VIII 350) says

One may certainly kill without hesitation a man who comes upon him as an *ātātāyin*, whether he be a teacher or a child or an old man or a learned brāhmana'

and as for the text of Kātyāyana (same as Vasistha III 17)

' one may go on to kill another who approaches as an *ātātāyin* (1 e.

1. ' Who connives '—This man is not able to prevent the offence, but he does not raise even a vain protest nor does he inform others of the intended *sūhasa*

2 As to absence of corporal punishment for a brāhmana, compare Gautama XII 48, Manu VIII 379-380, Baud. Dh S I 10 17 As to the marks branded for the several sins, vide Manu IX 287 and Baud Dh. S I 10 18 For the several punishments appropriate to a brāhmana offender vide Baud Dh S I 10 18, Gautama XII 44 and Manu VIII. 379-380.

3 The text of Sumantu is variously read and interpreted Vide Vir p 22

4. ' Ātātāyin ' literally means ' one who goes with his bow strung ' (1. e ready to fight). Rudra is called *ātātāyin* in Vāj S 16 18 and Kāthaka S. 17 12 Atharvaveda I, 19, II 19, III. 1 and 2, VII. 108 were employed as charms against enemies,

* P. 241 (text),

with a felonious intent) even if he be one who has thoroughly mastered the Vedas, thereby he does not incur the sin of *brāhmana* murder

these (two texts) are (really) meant to apply to an *Ātākṣin* who is not a *brāhmana* as the use of the word 'api' (even) and *vā* shows.¹ The reference to the *brāhmana* is in the nature of an *a fortiori* argument² as in even a *brāhmana* if an *Ātākṣin* may be killed what then of another. This is the explanation given in the *Mitākṣarā*,³ since Gālava says:

"He who kills even a learned *brāhmana*⁴ who approaches as an *Ātākṣin* raising his weapon (to strike) does not become the murderer of a learned *brāhmana* he would be so if he did not kill him and since Bṛhaspati says

He who kills a *brāhmana* felon versed in the Vedas and born of a good family does not commit a *brāhmana* murder he would be guilty of of *brāhmana* murder if he did not kill him

The conclusion of the *Candrikā* (i. e. *Smṛti-candrikā*) is that even a *brāhmana* felon coming to kill a man is by all means to be slain that a *brāhmana* who steals one's field wife or the like (and is therefore a felon) is not to be killed that a *kṣatriya* and the rest in similar circumstances (i. e. stealing a field or a wife) are to be killed. And this conclusion (of the *Candrikā*) is proper⁵ since the texts of Manu, Kātyāyana, Gālava and Bṛhaspati referring as they

1. These two verses very much exercised the minds of ancient writers. Manu XI, 89 lays down that there is no expiation if one intentionally kills a *brāhmana* and in Manu IV 102 there is an injunction not to kill one's guru, parents, *brāhmanas* and cows. Therefore Manu VIII 360 if literally taken as a *vidhī* would conflict with Manu IV 102 and XI, 89. But really Manu VIII 360 is an *arthaśūdra*. In Manu VIII 348-349 it is said that anyone of the first three classes may take up arms when there is hindrance to dharma or in self-defence or for protecting women and *brāhmanas* and that if he kills anyone while doing this there is no sin incurred. Then 360 says that one may kill an *Ātākṣin* whether he be a guru etc. So these words do not contain a *vidhī* saying that guru must be killed when he is an *Ātākṣin*. These words only convey that even a guru may have to be killed, what of others? Such particles as *val* (in the Vedas) or *vā* are indicative of an *arthaśūdra* (a laudatory or condemnatory text). Vide Jaimini I 2, 7 and 26-27. Vide notes to V M. pp. 416-419 for detailed explanation.

2. *Kaimutika* is derived from the words *kim-uta kaimutika nyāya* is a maxim used where a conclusion will *a fortiori* follow as regards certain matters when it is concluded that it does follow in certain other less important or less obvious matters.

3. The conclusion of the *Mit.* is stated on Yā. II 21.

4. *Bhrūpa* ordinarily means a child in the womb but *bhrūpa* in Gālava is explained by Sm. C. as *brāhmana* and by the Vir. an excellent *brāhmana*. According to the Baudhāyana Gṛhya a *bhrūpa* is one who knows the whole Vedic lore of his *s'ākhā* up to *sūtra* and *pravacana*.

5. Vide notes to V M. pp. 419-420 for the views of the *Smṛti-candrikā*. *Nīlakapṛṣṭha* approves of the three propositions of the *Candrikā*, but as will be seen a little lower down he adds a qualification to the first proposition of the *Candrikā* viz. that though an *Ātākṣi* *brāhmana* may be killed, that holds good as regards past ages, but in the present Kali age an *Ātākṣi* *brāhmana* cannot be killed even in self-defence. In his *Nīti mayukha* *Nīlakapṛṣṭha* approves of the three propositions of the *Candrikā* without qualification.

do to a particular felon viz. one who is intent upon a killing a person, it is right to hold that they are (in the nature of) exceptions to the previously cited texts of Sumantu and Kātyāyana that are in the nature of a general proposition (about felons) ¹. As for the text of Brhaspati

he, who will not kill a felon of the highest class that is endowed with the best religious conduct and Vedic study, though he deserves death, shall acquire the merit (of the performance) of a horse sacrifice,

that too has reference to a felon other than one intent upon killing that man. Moreover by the text 'excellent brāhmanas even though felons should not be killed (even) in a fight that is just (or approved by the s̥āstras)' the slaying of a brāhmana felon intent upon killing another is forbidden. This prohibition (about killing an ātatāyī brāhmana) in the Kali age would be unmeaning if it (killing an ātatāyī brāhmana) were not enjoined as an act to be done.² For all digests (on dharmas̥āstra) establish that the prohibition of certain acts in the Kali age fell within the purview of enjoined acts (as regards former ages) on account of the proper significance of the word *dharma* occurring in the text 'the wise declare that these *dharmas* (enjoined acts) are to be avoided in the Kali age'. Therefore in the Kali age a felonious brāhmana even though intent upon killing a person should not be killed (even in self-defence by that man), but in other ages he was certainly (allowed) to be *killed; however a felonious brāhmana different from the preceding (i. e. one not coming to kill) was not to be killed (i. e. killing him was forbidden) in all ages, while all felons whatever of the kṣatriya and other classes are liable to be killed in all ages. This is a bare outline (of the subject)

Brhaspati (p. 363 vv. 25-28) declares the punishments for seizing articles of the lowest, middling or best kinds

One who destroys or steals implements of husbandry, flowers, roots and fruits shall be fined a hundred or more (up to two hundred) according (to the nature of the property). One who destroys or steals cattle, clothes, food, drink, household utensils should be punished with a fine of two hundred or more. In the case of women, men, cows, gold, precious stones, the property of a deity or of a brāhmana or of women and in the case of other precious things the fine shall be equal to the value (of the thing_x stolen).

1. The texts of Sumantu and Kātyāyana in general terms say that an ātatāyī brāhmana should not be killed, the four texts of Manu and the other sages particularly refer to a brāhmana approaching for killing, therefore they restrict or modify the general rule. The maxim is 'sāmānyam vis̥esena bādhyate' (a general proposition is modified or restricted by a particular one).

2. A nisedha only prohibits what would otherwise follow as a matter of course. Vide p. 281 n 3 above. Since ātatāyībrāhmana-vadha is forbidden in kali along with several other matters, all of which are spoken of as *dharmas* proper in former ages, it follows that such a vadha was a *dharma* in former ages.

* P. 248 (text).

Or double (the price) shall be inflicted by the king having regard to the offender, or the thief shall be executed to prevent a repetition (of the offence)

Yajñeyam means stridhana the word 'vā' (in the last half) is used in the sense of eva (certainly) Madana says that these texts refer to the subject of *sāhasa* (and not to *steya*) on account of the proper signification of the words 'vināśayan (destroying) hartā (a robber)'.¹

Yājñavalkya (II. 231) states the punishment for him who incites a man to a *sāhasa*

He who causes the commission of a *sāhasa* should be made to pay a fine double (of what the offender himself has to pay) He who causes another (to commit *sāhasa*) by saying thus I shall pay shall be made to pay a fine four times as much.¹

Dvaiguṇyam and cāturguṇyam mean double or quadruple of what is imposed as a fine on the actual offender Manu (VIII 378) lays down the fine for him who by force enjoys a virtuous brāhmaṇa woman

*A brāhmaṇa enjoying a guarded brāhmaṇa woman against her will shall be fined a thousand paṇas²

But if the crime be committed by a kṣātriya or the like against such a brāhmaṇa woman, Bṛhaspati (p 363 v 10) says

(The king) shall confiscate the whole of the wealth of him who forcibly violates another's wife and having caused his penis and scrotum to be cut off he shall cause him to be paraded (in the streets) on an ass.

Kāmayat (in Bṛhaspati) means enjoys another's wife As regards rape of a woman of the same caste by a man of the kṣātriya or other caste or by persons who are offsprings of an *anuloma* marriage or offsprings of a *pratiloma* marriage Kātyāyana declares the punishment

When a man has forcibly enjoyed a woman (the king) should inflict death on him since that act is (a grave) transgression of proper conduct The same author (Kātyāyana) says

When a woman has been enjoyed against her will she shall be kept in the house well guarded her body being in a slovenly (or dirty) state she should sleep on the ground and should receive bare maintenance (to keep body and soul together)³

The same author (Kātyāyana) says

She who has been enjoyed by a man of a lower class is to be abandoned or may suffer death.

1 I shall pay —this means either a reward to the offender or that he would pay the fine imposed on the wrongdoer.

2 Guarded means either by her husband or by her own vows of chastity &c

3 This is By p. 367 v 18

P 234 (text)

'Vadha' it should be understood, was to be effected if she was a consenting party.¹ Nārada (p 203 vv 7-8) states the punishment for sāhasa of the lowest, middling and highest degrees

The punishment for a sāhasa of the lowest degree must be a hundred panas at the least in proportion to the act (i e the gravity of the offence), while for a sāhasa of the middling degree the fine prescribed by those conversant with the śāstras is five hundred at least. For* sāhasa of the highest degree a fine of not less than a thousand is ordained (Besides) death, confiscation of all property, banishment from the town, branding and amputation of that limb (with which the crime was committed)—these are declared to be the punishment for sāhasa of the highest degree

The direction (in the smṛtis) to inflict death, mutilation and the like is addressed to the king and to none else, since he alone has the authority (or right) to inflict punishment

Thus ends (the section on) sāhasa.

Now begins (the section on) adultery.²

Forcibly enjoying another's wife being a sāhasa, the punishment for it has already been stated. But as regards the enjoyment of another's wife of the same caste by fraud Brhaspati (p 366 v. 11) says

When a man enjoys a woman by fraud his punishment will be the confiscation of his entire wealth and he shall then be branded with the mark of the female private parts and be banished from the town.

'Salyaharah' means 'that which takes away the entire property.' This punishment applies in the case of a woman of the same caste; in the case of a woman of a lower caste, (the punishment is) half of this, in the case of a woman of a higher class (than the adulterer), it is death. And similarly the same author (Brhaspati p 366 v 12) says

Half of that punishment that is prescribed for (adultery) in the case of a woman of the same caste is imposed, when the woman is of a lower caste: but for connection with a woman of a higher caste, the punishment for the male is death.³

1. If she consented to her being enjoyed by a man of low caste. It is also possible to take it in the sense 'if she consented to submit to death'

2 Vide *Rakṣ v. Govind* 1 Bom. 97 at p. 116 where it is said after referring to the *Mayūkha* that adultery was regarded and punished as a crime of a grave character.

3 This verse prescribes punishment for the male, but says nothing about the woman.

* P. 245 (text)

The same author (Bṛhaspati p 868 v 9) prescribes the punishment for the three kinds of adultery viz lowest middling and highest:

For these three (gradations of adultery) the first middling and highest fines shall be inflicted respectively even higher fine may be awarded if (enjoyment is had) forcibly in a lonely place¹

*Manu (VIII. 354) lays down the punishment for a vicious man having a talk with the wife of another man

If a man engages himself in a conversation with the wife of another when he had already been accused of (similar) offences (with regard to her) he shall undergo the first amercement²

In regard to conversation between a man and woman who have been both forbidden (to talk) by their parents and the like Yājñavalkya (II 295) says

A woman (talking) after being forbidden should be fined a hundred *paṇas* while the man should be fined two hundred when there is prohibition (addressed) to both the punishment for both is the same as in adultery

The first half of the verse refers to prohibition (addressed) to each separately while the latter half to prohibition addressed to both Yājñavalkya (II. 296) states the punishment for intercourse brought about by mutual desire

When (the adultery is) between members of the same caste the highest amercement is the penalty for an *anuloma* intercourse (adultery with a woman of a lower caste) the middling amercement (is the penalty) but for *pratiloma* intercourse (adultery with a woman of a higher caste) death (is the penalty) for the male and the lopping off of the ears and other limbs in the case of the woman³

Kātyāyana says

In the case of all offences women should pay half of the monetary punishment which is prescribed for a male, when (the punishment) for the male is death, (the punishment for women) would be cutting off a limb

With regard to intercourse with a brāhmaṇa woman leading a loose life Manu (VIII 378) says

He would be liable to a fine of five hundred for intercourse with a consenting woman.

1 The threefold grades of adultery are made as regards *anurāga* (vide Bṛ p 865 vv 2, 5-8) Therefore the fourth quarter as read in the text is irrelevant and the reading *dravipādhike* of Apārka and others is better. It means higher fine may be inflicted on a rich man.

2. But there was no objection to talk with another's wife for a reasonable cause and if there had been no previous charge. Vide Manu VIII 355.

3. The Mit. construes this verse differently. Vide notes to V M. pp. 490-497
P 246 (text)

*This refers to a woman of the same caste The same author (Manu VIII. 385) says as regards *anuloma* intercourse with women of loose character :

A brāhmana having intercourse with a ksatriya or vaiśya woman who is unguarded or with a s'ūdra woman should be fined five hundred panas and a thousand *panas* if he has intercourse with a woman of the *antyaja* class.¹

As to the text of Manu (VIII 383) 'a brāhmana should be made to pay a fine of a hundred panas, if he has intercourse with guarded women of the two classes (ksatriya or vaiśya),' it refers to a chaste woman. Manu (VIII. 374) declares the punishment of a s'ūdra for intercourse with a woman of a higher caste :

A s'ūdra having intercourse with a woman of the twice-born classes whether guarded or not shall lose the (offending) limb and his whole estate when the woman is unguarded and loses everything (including life) if the woman is guarded.

The meaning is . a s'ūdra having intercourse with an unguarded woman of the twice-born class is liable to have his penis cut off and all his property confiscated, but if he has intercourse with a guarded woman he incurs the confiscation of all his property and death. Gautama (XII. 2-3) says 'for adultery with the wife of the preceptor, the man's penis will be cut off and his whole property will be confiscated, and if the woman be guarded, there is the additional (penalty of) death.' Manu (VIII 376) says

'When a ksatriya and vaiśya have sexual intercourse with a brāhmana woman, who is unguarded, the vaiśya shall be fined five hundred, but the ksatriya one thousand.'²

The same author (VIII 377) says

†Both of them (ksatriya and vaiśya) however, if they commit adultery with a guarded brāhmana woman, should be punished like a s'ūdra³ or be burnt in a fire of dry grass.

The same author (Manu VIII 382) says :

If a vaiśya has intercourse with a guarded woman of the ksatriya class or a ksatriya has intercourse with a vaiśya woman (who is guarded), both of them deserve the same punishment that is awarded (for intercourse) with an unguarded brāhmana woman.

The meaning is that the fine is what is inflicted for intercourse with an unguarded brāhmana woman Vasistha (21. 3--5) says 'if a ksatriya has intercourse with a brāhmana woman, (the king) shall throw him into fire after'

1. Antyaja woman would be a woman of the untouchable classes such as leather workers, cāṇḍālas &c Vide notes to V M p 27

2. Read 'yadāguptām' (yadā+aguptām) in the text.

3. i e. with the loss of the penis, all property and life.

* P. 247 (text). † P. 248 (text).

having tied him up in leaves of sara grass the same (punishment should be awarded) if a vaiśya has intercourse with a kṣatriya woman and a śūdra, with kṣatriya or vaiśya woman. Nārada (p 179-180 vv 73-75) says

The mother the mother's sister mother-in-law maternal uncle's wife, father's sister the wife of a paternal uncle, of a friend and of a pupil the sister sister's friend daughter-in-law daughter the wife of a preceptor a woman of the same goṭra a woman who has come for an asylum or refuge, a queen, a female ascetic a nurse any chaste woman and a female of the highest caste—when a man has intercourse with any one of these women he is said to have violated the preceptor's bed for such a crime no punishment other than excision of the penis is ordained (in the smṛtis)¹

Yājñavalkya (III 292-293) also says

One who has intercourse with his father's or mother's sister maternal uncle's wife or his own daughter-in-law or with his step-mother or sister or his preceptor's wife, or daughter with his own daughter becomes a violator of the preceptor's bed His penis should be cut off and he should be put to death and the woman also (should be put to death) if she was full of lust (i.e. a consenting party)

*This punishment is not to be inflicted on a brāhmana, since Bṛhaspati in his section on brāhmanas says

The king should brand with painful punishments a brāhmana who has started on the path of having intercourse with another's wife and should banish him One not a brāhmana deserves for adultery any punishment up to death.

Śaṅkha-Likhita say 'with whatever member of the body an offender commits an offence that very member of his should be cut off except in the case of a brāhmana Yājñavalkya (II 290) declares the punishment for a brāhmana when he has intercourse with a female slave and the like

A man having intercourse with *avaruddhā* slaves and *bhujyā*s shall be made to pay a fine of fifty paṇas even when intercourse with them may be unobjectionable (on the ground of caste &c.).²

Avaruddhā are those that are forbidden by their master to have intercourse with other men. Nārada (pp 180-81 vv 78-79) says

1. The V R. says that mother means step-mother here. It is to be noted that intercourse with a female ascetic is put by Nārada on a par with incest. Manu VIII 363 treats it on a level with intercourse with wives of actors and singers and punishes it lightly Vide also 1.4. II. 293 quoted at the end of the section on adultery

2. The text of 1.4. and the Yukha thereon are quoted in 48 Cal. 613 R. at p. 691 and in *Yashwantrao v Kashbal* 12 Bom 25 at p. 29 n.5. Vide also *Muthura v P* 4 Bom 515 at pp. 543-50. According to the Mit. an *avaruddhā* is one who is ordered by her master to stay at home for service and who is forbidden to have intercourse with other males while a *bhujyā* is a concubine kept by the master himself. Vide *Jai Nagabai v Jai Mangabai* L. R. 53 I A. 163=50 Bom 601 at p. 512 for the meaning of *avaruddhā*.

Intercourse is permitted with a wanton woman who belongs to another than the brāhmana caste, or with a prostitute, a female slave or a female who has left her family, if these belong to a lower caste; but intercourse is not permitted with (such) women if they belong to a higher caste. When, however, such women are kept mistresses (of another man) intercourse with them is as culpable as with another's wife¹

The word 'abrahmani' is an attribute of the word 'svairini'; svairini means 'one who is independent and has free intercourse with men'; 'nigrahmani' is 'a woman who has left her family and has free intercourse with men.' Yājñavalkya (II. 291) says

If a man has connection with an *antya* (untouchable) woman he should be branded with an obscene mark and banished, similarly a sūdra is liable to be branded only if he does the same, but if an *antya* (untouchable) have intercourse with an *āryā* woman death (is the penalty).²

When the sexual intercourse is wilfully brought about by a woman, (she being the aggressor) Nārada³ states the punishment for her:

When a woman comes to a man's house and has intercourse with him after exciting his passion by touching him and the like acts, she should be punished⁴ and half of her punishment should be inflicted on the man.

Yama prescribes the punishment for women of the brāhmana and other castes for intercourse with sūdra males or the like:

The king should have that woman devoured by dogs at the place of the executioners (cāndālās), who, being overpowered by passion, seeks a sūdra (for intercourse)⁵ That brāhmana woman who resorts to a vaiśya or ksatriya (for intercourse) would have her head shaven and shall be marched on an ass (through the streets)

'Vrsala' means 'a sūdra', 'vadhyaghātinaḥ' means 'executioners'; the meaning is 'at the place where executioners live' In the Candrikā (Smṛti-candrikā) it is said that this fine is inflicted for excessive attachment (to the paramour) Yājñavalkya (II. 289) declares the means of determining (the fact of) adultery:

A man is to be held (caught) as guilty of adultery by the fact of his caressing the hair of another's wife or by flesh signs of lust or by the confession of both

1. 'Niskāsini' is explained as 'a female slave not restrained by her master' by Mādhvācārya and others. The Mayūkha follows the Madanaratna.

2. 'Āryā' woman means 'a woman belonging to the three higher castes' Āp Dh. S II. 2. 3. 1 and 4 distinguishes between Ārya and Sūdra. The Mit and Vir. read 'antya eva' which means that the sūdra would himself become an antyaja. The force of 'eva' is this that he is not liable to be punished.

3. This is Br p 367 v 15

4. Her punishment would be the same as is prescribed for a male who makes the first overtures.

5. Compare Gautama XXIII. 14 and Manu VIII. 371.

* P. 250 (text)

From the expression *dvayoh* (occurring in Yā) it follows that even if one of the two admits adultery there is no certainty. As regards slander Yājñavalkya (II. 289) says :

For uttering a (true) slander about a woman a man should be fined a hundred *paṇas* and two hundred if he makes a false accusation¹. For intercourse with beasts he should be made to pay one hundred and one who has intercourse with a distressed woman (even if she be one's own wife) or a cow should be fined the middling amercement.

Also (Yā; II 298)

If a man has intercourse with a woman in an improper part and if one voids excrement before a male the fine² is twenty four *paṇas* and the same (is the fine) for intercourse with a female ascetic³.

¹ *Dinām* means distressed woman, even one's own wife. The meaning is one who voids excrement and the like before a woman.

Thus ends (the section) on adultery

Now begins (the section) on duties of husband and wife.

Punishment for the husband's abandoning a wife possessed of good qualities is thus declared⁴.

If a man leaves a wife who is obedient not sharp-tongued skilful, possessed of virtues and solely devoted to her husband, the king should place him (on the right track) by means of punishment Yājñavalkya (I 76) says

He who deserts a wife that carries out his commands, who is diligent, mother of an excellent son and speaks pleasantly shall be compelled to pay the third part (of his wealth to her), or if he has no wealth he shall be compelled to provide maintenance for her⁵.

The same author (Yā; I 77) says with regard to women

Wives should do the bidding of their husbands. This is the highest

1. Both the Mlt. and Aparārka take *stri* as meaning maiden here. Nārada (p. 178 v 30) enumerates the dopes of maidens as affliction with a chronic or disgusting disease, deformity, loss of virginity by sexual intercourse, being wicked, having the heart fixed on some one else.

2. Nilakaptha seems to have read *purgam*. But Mlt., Aparārka, Par M. and Vir read as in the text.

3. This is Nārada p. 181 v 25

4. This is quoted in *Satīrīkai v Laxmīkai* 2 Dom. 575 at p. 529 as a mandatory text requiring the husband to maintain his wife irrespective of the possession of property p. 251 (text).

duty of a wife. Even if the husband be tainted with a deadly sin she should wait for him till he is purified (by expiations).

Thus ends the section on duties of husband and wife.

*Now begins the (section on) gambling and prize-fighting.¹

Yājñavalkya (II. 201) says .

The king should enforce payment of the stake property won in a public assembly of bettors presided over by a master (of the gaming house), when the king's share (in the stake won) has been paid up (by the master) and not otherwise (when carried on secretly and without sabbika).

'Prasiddhe' means 'not in secret'; 'dhūrtamaṇḍale' means 'in a gaming house'; 'sabbikah' is the superintendent of gambling appointed by the king. The meaning is 'the king should enforce payment of what is won in this manner (indicated in the verse) and nothing else. The same author (Yaj II. 202) lays down the punishment for him who is guilty of fraud in gambling :

Men who play with false dice and by tricks should be branded by the king and banished.²

'Upadhīh' means 'a trick or fraud.' Manu (IX 224) declares the punishment if gambling be carried on without the king's permission :

The king should punish corporally all those who themselves engage in gambling and prize-fighting or cause (incite) others to do so and also sūdras who wear the marks of the twice-born³

'Dvijaṅgam' (marks of the twice-born) means 'the sacred thread, uttering the Veda and the like' Yājñavalkya (II. 203) extends the rules about gambling to *samāhvaya* (prize-fighting) :

This very law should be understood to apply to prize-fighting in which there is gambling with animate objects.

1. The difference between *dyūta* (gambling) and *samāhvaya* is that the former is carried on with inanimate objects (like dice) and the latter with animate objects (such as cocks, rams, bulls, buffaloes, and wrestlers). Vide Manu IX. 223, Nārada p. 212 v. 1 and Br. 385 v. 3

2. Compare Nārada p. 213 v. 6.

3 The attitude of Manu towards gambling was rather uncompromising. But Yājñavalkya allowed gambling under the supervision of persons appointed by the king as it helped in detecting thieves. Brhaspati p. 385 v. 1 says that gambling was prohibited by Manu, because it destroys truth, honesty and wealth, but other legislators permitted it when conducted so as to allow the king a share in the stakes.

* P, 252 (text),

Prāpidyūte is an attribute of samkhyā and the meaning is samkhyā which is different from it¹ (only in this that it is gambling with animate objects).

Thus ends (the section on) gambling and prize-fighting

*Now begins (the section on) miscellaneous matters²

Yājñavalkya (II 295-296) says

He who either omits or adds anything in writing to the king's edict or who allows an adulterer or thief to escape shall suffer the highest amercement. He who defiles a brāhmaṇa, kṣatriya vaiśya, śūdra by feeding him with food not fit to be eaten should be punished with the highest amercement the middle amercement, the first amercement and half of the last respectively.

Abhagyam means wine urine ordure and the like. The same author (Yāj. II 297) says

He who deals in false gold (as genuine) who sells unclean meat should be deprived of a limb and should be made to pay the highest amercement.

Vimāmsam means the flesh of cows and the like.³ In the Mitākṣarā it is said that by the use of the particle ca (and) it follows that mutilation is also meant (to be an additional) punishment. Similarly (Yāj. II 300)

If the owner of animals with tusks or horns fails to rescue a man (attacked by such animals) though able to do so he should be awarded the first amercement and double that amount (when he does not rescue) even though (the victim) cried aloud (for help)

Vikrośah means crying out. Manu (VIII 298-299) says

If a human being were killed (by an animal or car through the carelessness of the driver) he would at once incur the guilt of a thief. If such large animals as cows elephants, camels horses and the like were killed (through rash driving) half (of the highest amercement) was to be inflicted. On the death of minor animals (by rash driving) the fine is two hundred but the fine is fifty paṇas when auspicious animals (like deer)

1 It is better to read tad-abhinno for tad bhinnno. Tad abhinno would mean that samkhyā is prāpidyūte and that the rules about the former are not different from the latter.

2. Vṛqu 42.1 defines prakṛpaka as what is left unsaid elsewhere. According to Mārkaṇḍeya (p. 214 vv 1-4) prakṛpaka comprehends all those matters in which the king acts of his own motion without any complaint being lodged or a suit being filed and whatever else that may have been omitted in the preceding titles of law. Vide Vyāsaṭṭhi p. 590 v 1.

3. Mit. explains vimāmsa as unclean meat mixed with dogs' flesh while Aparādhā explains it as the flesh of the village pig and the like passed off as excellent meat.

and birds (like pigeons and parrots) are killed ' Five māśas is the fine for one who kills an ass, goat or sheep ¹ The fine is one māśa for killing a dog or hog

It is to be understood that this fine (was to be paid) after paying to the owner the price of the animal killed. Yājñavalkya (II 301) says

He who chinges the paramour (of a woman in his family) as a thief should be made to pay a fine of five hundred and he who lets him off after taking money from him should be fined eight times that (money) ²

' Uprajya ' means ' having received '

The king should harnish, after cutting out his tongue, that man who pronounces an imprecation of misfortunes on the king or who runs down the king or who divulges the king's secret counsels (Yāj. II 302).

' Anistam ' means ' death and the like ' ; ākroś'ah means such things as saying ' may you lose the kingdom ' Manu (IX 275) says .

Men who rob the king of his treasure, men who obstinately oppose his commands and those who are in league with his enemies should be punished by various modes of punishment

Yājñavalkya (II. 303) says

The punishment for him who sells what was on a dead body, likewise for him who strikes his preceptor, and, for him who seats himself on the king's vehicle or throne is the highest amercement

' Mrtāṅgalagnam ' means ' the clothes and the like on dead body ' The same author (Yāj II 304) says

The punishment for him who puts out both eyes of a man, for him who obeys one that is hated by the king and for a s'ūdra who makes his livelihood by passing himself off as a brāhmana is a fine of eight hundred ³

‡ The meaning is (the fine) for one who puts out both eyes, who does an act forbidden by the king and for a s'ūdra who makes a living by the mode of life of a brāhmana In the Mitākṣarā a smṛti is quoted to the effect that if a s'ūdra put on the sacred thread for securing a meal at a s'rāddha he should have imprinted on his body with a heated rod a line resembling (the position of) the sacred thread The same author (Yāj. II. 305-306) states the punishment for those who wrongly decide litigations

1 Kullūka explains that the fine was five silver māśakas (and not of gold) A silver māśa was equal to two kṛṣṇalas Vide Manu VIII 185.

2. Both Mit and Aparārka explain that he who through fear of infamy to his family or in order to save from publicity the reputation of his women says of a paramour that he was a thief was to be fined

3 ' Rājadvistādes'akṛt ' is explained by the Mit as one ' who being an astrologer (and not an elderly relation or friend of the king) makes a prophecy of impending misfortune as to the king If a s'ūdra, in order to secure a meal, wears the sacred thread and the like he was to be punished

* P 254 (text). ‡ P. 255 (text)

Having again investigated (i e. reviewed) those litigations that were wrongly decided assessors (and also judges) together with the party (declared by them to be) successful should be fined by the king twice the amount (that was) in dispute¹. If a man who was justly defeated (in a litigation) still thinks I am not rightly declared to be the losing party and again comes to court he when again defeated shall be made to pay a double fine.

Here (in all verses about fines) the mention of a number without express statement of the object (to which the number refers) is to be understood as referring to *pāpas*. *Papa* is a piece of copper equal to a *karpa* from (the verse) of the lexicon (of Amarasimha) a *papa* is the word applied to a copper piece equal to one *karpa*.² A *karpa* is a fourth part of *pala*. And a *papa* is (in value) as defined by Bhāskaraśāstrya³ 20 cowries make a *kāṅki* and four *kāṅkis* make a *papa*. As regards the fines designated the highest and the like Yāj (I 866) says

The highest fine is a fine of 1080 *papas*, the middling one is half of it and half of this last is declared to be the lowest.

Moreover in case it is impossible to award adequate punishment for offences already described by means of the fines of the indicated magnitude (by Yāj) even a greater fine may be inflicted as Āpastamba says they say that *dapḍa* is so called because it represses by means of it the king should repress those who are not repressed⁴. So also Nārada (p. 215 vv 10-11) states a special rule when the punishment is confiscation of all property

* The weapons of soldiers the heasts of burthen and the like of carriers of goods the ornaments of prostitutes the various musical instruments of professional musicians and whatever is a tool for anybody and by which artisans acquire their livelihood—all these a king is not entitled to take even when he confiscates the entire property⁵.

Yājñavalkya (II 807) states what is to be done with a fine levied unjustly

1 Vivādāt &c may also mean twice the amount of the fine that was inflicted in the litigation that was wrongly decided.

2 This occurs in the Amarakos a 2nd *kāṅka* *vaśīyavarga*. Amara says that five *guṇḍis* were equal to one *māsa*, 10 *māsas* were equal to *karpa* and four *karvas* made one *pala*—two things are stated about a *papa* viz. its weight as copper and its price.

3. This is part of verse 2 in Bhāskaraśāstrya's *Līlāvati* where a table of values is given viz. 20 cowries = a *kāṅki* 4 *kāṅkis* = a *papa*, 10 *papas* = a *dramma*, 10 *drammas* = a *hika*.

4 This is really Gautama XI 28. The derivation of *dapḍa* from *dam* is ascribed in the *Nirukta* to Aupamanyava (II 2).

5 The principle underlying these verses has been accepted in modern times in the expulsion of decrees by attachment and sale. Vide section 60 proviso b of the Civil Procedure Code (of 1908)

The fine that has been obtained by a king unjustly should be offered by him to Varuna making it thirty times as much and should be distributed by himself among brāhmanas¹

The meaning is let him first mentally offer thirty times as much to Varuna and then let him give the money to brāhmanas.

Thus ends (the section on) miscellaneous matters

In the *madhyades'a* (middle regions of India) famous for meritorious actions and situated in the vicinity of the auspicious confluence of the Carmanvati (Chambal) with the Yamunā, stands the famous city of Bhārucha, where rules the king Bhagavantadeva who is devoted to the lotus-eyed god (Viṣṇu)

Thus ends the Vyavahāramayūkha (ray of judicial matters) in the (work)

Bhagavadbhāskara composed by bhāṭṭa Nīlakantha, who was commanded by Bhagavantadeva, the lord of kings, an ornament of the

S'angara race, (Nīlakantha) who was the son of bhāṭṭa S'ankara,

the head jewel of panditas, and the leader among those

who had crossed beyond the ocean of the Mīmāṃsā

system and the son of the learned bhāṭṭa

Nārāyaṇa styled *jagad-guru*

1 Manu (IX 244-245) gives the reason of this procedure Varuna is the divine lord of punishment who rules over kings and a brāhmana who has fully mastered the Vedas is lord of the world Varuna is styled ' rājan ' in the Ṛgveda and is regarded as noting the good and evil deeds of men Vide Ṛgveda VII 49 3

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